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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1534

LOCAL UNION NO. 167,
PROGRESSIVE MINE WORKERS OF AMERICA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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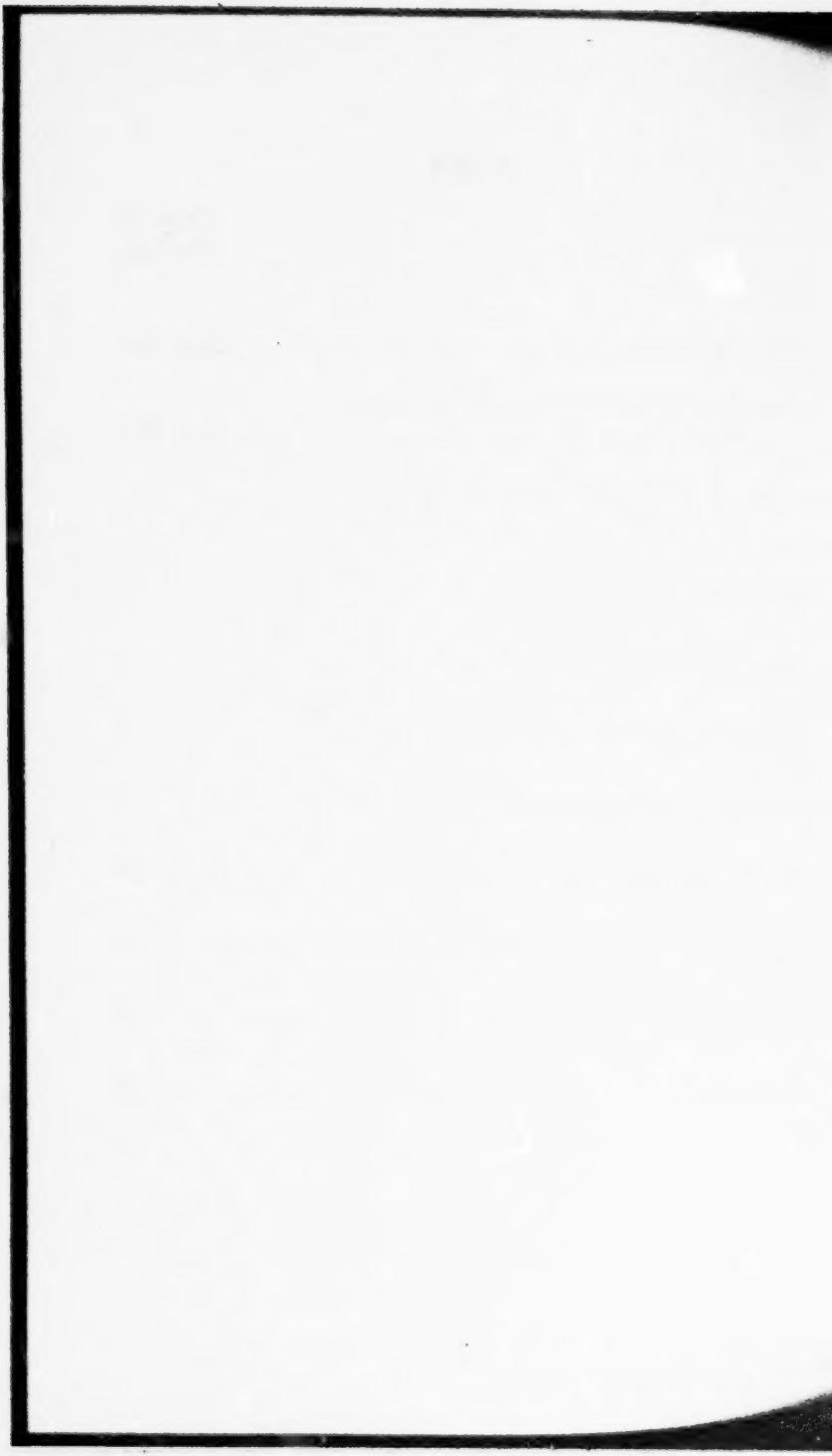

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The Petitioner, Local Union No. 167, Progressive Mine Workers of America, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit rendered in these proceedings on February 6, 1970.

OPINIONS BELOW

The Decision of the Trial Examiner in Case No. 14-CB-1562 before the National Labor Relations Board is attached

to this Petition as Appendix A, and is found at pages App. A-1 to App. A-12. The Decision and Order of the National Labor Relations Board is reported at 173 NLRB No. 189, Case No. 14-CB-1562, decided by the National Labor Relations Board on December 11, 1968 and is attached hereto as Appendix B and is found at pages App. B-1 to App. B-6.

The Opinion of the Circuit Court of Appeals for the Seventh Circuit, appears as Appendix C and is attached hereto at pages App. C-1 through App. C-9, of the Appendix. It is not as yet reported.

JURISDICTION

The Judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 6, 1970. A timely Petition for Rehearing was filed and was denied by the Court on February 25, 1970 and final judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 6, 1970 ordering enforcement of the Board's Order.

Since that time, timely motions have been filed for Stay of Mandate and Mandate has been stayed by the Court until May 7, 1970, being the date when the Petition for Certiorari is due to be filed in this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. The Board ordered the Respondent Local Union to accept the service fee from the charging party and to notify the Co-Trustees of the Welfare and Retirement Fund that they were eligible for benefits. There is no provision whatsoever in the Constitution and By-Laws of the organization for such a service fee. The Board and the Court have arbitrarily fixed the amount of the service fees. Respondents

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contend that if such service fees are levied, assessed and taxed that they would then be in violation of Section 101 (a) (3) (A) of the Reporting and Disclosure Act of 1959.

2. Although the Union Constitution provides very clearly, and which fact was known to the charging parties, that upon joining a rival union and taking up employment at another mine, membership in the P.M.W.A. is automatically forfeited, the Board and the Court held that the six (6) months period of limitation under Section 10 (b) of the National Labor Relations Act started to run from the date that their dues were mailed back to them rather than the date they actually lost their membership.

3. It is admitted by all parties that the mine was being operated under a valid Union Shop Agreement, and there is no question but what the charging parties had to pay dues to the Local Union during the time they worked at the mine, but the question arises as to whether or not it was a violation of the National Labor Relations Act for the Local Union to deny union membership in the local to an employee who voluntarily quit his job and went to another mine and joined another union, even though this might result in a loss of some economic benefits.

4. The question is presented to this Court as to whether the union acted properly within the scope of Section 8 (b) (1) (A) of the National Labor Relations Act which guarantees the union the right to prescribe its rules for membership, when a member of the union forwarded his right to membership, in violation of one of those rules.

5. The question is presented as to whether or not the Board and the Court had the power to enter an Order which would in effect give to member employees two pensions from the same industry and thus place a burden upon interstate commerce, where the evidence clearly showed

that the charging parties were covered under a pension system funded by the operator for which they were then working which gave them full prior service credit for their entire time spent in the coal industry.

STATUTES INVOLVED

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3). [July 5, 1935, c. 372, §7, 49 Stat. 452; June 23, 1947, c. 120, title I, §101, 61 Stat. 140; 29 U.S.C., §157.]

29 U.S.C., 157

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer—* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein

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on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

29 U.S.C., 158 (a)(3)

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents— * * * * *

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

29 U.S.C., 158(b)(1)

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

29 U.S.C., 158(b)(2)

REPORTING AND DISCLOSURE ACT OF 1959

(3) Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act shall not be increased, and no general or special assessment shall be levied upon such members, except —

(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum con-

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ducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and by-laws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

29 U.S.C., 411(a)(3)

STATEMENT OF THE CASE

A. Nature of the Case

District No. 1, Progressive Mine Workers of America (hereinafter called PMWA) is a Labor Organization made up of many local unions one of which is the Respondent in the instant case known as Local Union No. 167, Progressive Mine Workers of America (hereinafter called Local 167) and is also affiliated with the International Union, Progressive Mine Workers of America hereinafter called International Union. District No. 1 has a master coal contract with the Coal Producer's Association of Illinois, an association of coal operators, hereinafter called Coal Producers. Peabody Coal Company, hereinafter called Peabody, is a member of Illinois Coal Operators Association who have a master contract with United Mine Workers of America, hereinafter called UMWA. Peabody operates some 26 coal mines of which more than 20 are operated under contract with UMW. However at the mine involved in the instant case called Midwest Radiant Mine, hereinafter called Midwest, Peabody has a contract with PMWA for the operation of Midwest Mine. Bosse and Ude, the charging parties, were employees at Midwest Mine. They had worked at Midwest for many years and on January 15, 1967 voluntarily gave up their employment (App. 103) and the next day took up employment at River King Mine, another Peabody Mine which was under contract with UMWA. Both the UMW (Exhibit Vol. P. 86) and the PMW (Exhibit Vol. P. 1-6) constitutions provide that there shall be no dual unionism and that any member can be expelled for dual unionism. The PMW constitution specifically provides that in the event a member quits and takes up employment at a mine not under contract with PMW he immediately forfeits his membership.

Peabody pays into the UMW Welfare and Retirement Fund for coal produced at those mines under contract with UMW and also pays into the PMW Welfare and Retirement Fund for coal produced at Midwest. This fund is known as the PMWA Welfare and Retirement Fund and is operated by two Co-Trustees one of whom is elected at large by the members of the PMWA and the other is elected by the members of the Coal Producer's Association.

After Bosse and Ude started to work on January 17, 1967 (App. P. 138) at River King Mine they tendered cash dues to PMW Local 167 which was rejected and returned to them. Thereafter they filed unfair labor charges with the NLRB and after a hearing, the Trial Examiner held that Local 167 had violated Section 8(b)(1)(a) and that the Union must accept what he called a tendered service fee from Bosse and Ude and keep them eligible for pension benefits. In the main the Board sustained the decision of the Trial Examiner and the Respondent is here requesting that the Decision and Order of the Board be reversed. The Board is asking for enforcement of its Order.

B. The Parties

The charging parties are Melvin J. Bosse (hereinafter called Bosse) and Marvin Ude (hereinafter called Ude). The only Respondent is Local Union 167. Neither District No. 1 nor the International Union nor the Co-Trustees of the Welfare and Retirement Fund are made party Respondents to this proceeding.

C. Statement of Facts

The Welfare and Retirement Fund of PMWA was created by a Trust Agreement dated July 25, 1946 which followed an amendment to the master contract between the Coal Producers and PMW dated June 12, 1946. The Trust

Agreement has not been amended since said date. The contract has been expanded and during all of the time payments have been paid for the purposes described in the agreement of June 12, 1946 and the Trust Agreement and said funds were to be used to provide benefits to the employees of mines of contributing operators covered by the employment contract (Exhibit Vol. P. 41). The Trust Agreement and the original contracts and all subsequent contracts have provided that the Plan of Benefits may be amended from time to time and further that "the moneys to be paid into said fund shall not constitute or be deemed wages due to the individual mine worker********** and no beneficiaries shall have any vested right in said fund (Exhibit Vol. P. 42).

The Plan of Benefits in the beginning provided for all funds to be held on a common pot basis after they were received by the Co-Trustees of the Welfare and Retirement Fund. In 1955, Plan No. 7 was adopted, which put the retirement moneys on a mine by mine basis. The pertinent portions of Plan 7 are found in Exhibit Vol. Pages 43-61. In 1958 the Plan was amended by Amendment No. 15 (Exhibit Vol. P. 64-67) which set up an allocation system in accordance with a tailor-made plan to be adopted for each contributing mine.

Peabody entered into a contract with PMWA for the operation of Midwest Mine (Exhibit Vol. P. 36-39) and a separate Welfare Contract (Exhibit Vol. P. 32-35). The labor contract adopted the master contract between Coal Producers and PMW except as modified by the Peabody Contract, and was a valid Union Shop Contract which is undisputed.

This mine had previously been under contract with PMW but in 1957 Peabody signed a contract with UMW

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for the operation of the mine. After extended litigation this Seventh Circuit ordered an election to be held at the mine and the men voted to rejoin PMW, and Peabody then entered into a new contract (1961) with PMW which is the contract above referred to. At that time there was $274,000.00 in the Retirement Pension Fund (contributed before Peabody signed the UMW contract), and that money was allocated on the formula set forth in the Peabody Resolution and Special Allocation Plan (Exhibit Vol. P. 7-31).

Thereafter contributions were made monthly and out of contributions to the Co-Trustees there was first deducted 15% for the reserve account, and sufficient moneys for the death and dismemberment fund, and the medical care fund, and the administration fund, which were all carried as common pots for the benefit of all employees of all contributing mines. However, the balance contributed by Peabody for production at Midwest after the payment of the foregoing was then allocated once each year by a bookkeeping entry in accordance with a formula worked out by actuaries to a retirement account for each individual member employee. The contract specifically provided "the principal of funding actuarially sound pensions for member employees of the Midwest Mine is hereby established. It is the desire of the parties that lifetime pensions of $100.00 per month for member employees retiring at or after age 60 and for any member employee immediately upon his becoming totally and permanently disabled so that he can not be gainfully employed, and for others to the extent that they are eligible under the Peabody Resolution, shall be fully funded, subject to the further terms of this contract". (Exh. Vol. P. 33) Said Agreement further provided that when pensions and benefits for said member employees of $100.00 monthly have been funded in accordance with the contract and the resolution, there-

after the contributions of the operator shall be reduced per ton to such amount as shall provide payment for all welfare benefits and only for such retirement pension benefits as are needed to maintain the funding of pension benefits for all member employees upon a fully funded actuarial basis. (Exh. Vol. P. 34)

In order to prevent duplication certain other pertinent portions of the contracts and plans are set forth in our argument.

The Peabody Resolution and Plan of Benefits as well as Plan 7 provided that a member employee must remain a member in good standing of the Local Union affiliated with PMW at all times to be eligible for benefits.

Bosse went to work at Midwest in August of 1939 and worked continuously until January 15, 1967 (App. P. 103) when he voluntarily resigned his employment and took up employment at a mine under jurisdiction of the UMWA. Ude went to work at Midwest in August of 1956 and voluntarily quit his employment on January 15, 1967 (App. P. 138) to take up employment at another mine under jurisdiction of UMW. Bosse was president of Local 167 and Ude was Mine Committeeman at the time they voluntarily quit. At a Union meeting on December 27, 1966 they both reported that they were resigning as union officers. (App. P. 130)

On January 16, 1967 Ude and Bosse gave a check to Local 167 each for $15.95 purportedly to pay union dues in Local 167 for eleven months from February to December inclusive. (G. C. Exhibit 15, Exhibit Vol. 81, Exhibit 18, Exhibit Vol. 82.)

It was stipulated that there was a valid Union Shop Agreement in effect at Midwest Mine which had been in effect since October, 1961. (App. P. 58-59)

The evidence is undisputed that there is one local union for each coal mine and that employees working at another mine cannot belong to any local union other than the one having jurisdiction over his mine at which he is employed.

Article VI, Section 1 of the District Constitution (G.C. Ex. 2) (Exhibit Vol. P. 1-6) provides for the dues structure of members consisting of 25¢ per month dues for the District, 25¢ for the International and 25¢ to the local union and a general assessment of 1% of gross earnings for the District General Fund and a 1% assessment of gross earnings for the District Death Fund. Section 4 provides where any member leaves the mine for another vocation in life he pays the same 75¢ plus 35¢ per month in lieu of the District 1 assessment for the general fund and 35¢ per month for the District Death Benefit.

Section 2 was amended to provide that a District assessment of 1% or a minimum of $1.00 per month to be withheld from all members receiving pension from the Welfare and Retirement Fund which shall go directly to the office of the District Secretary-Treasurer. On the same date July 1, 1966 Section 6 was amended by adding the following:

> "Any person working outside of the mines in other industries, one month in arrears for dues or assessment shall be dropped from the organization and can only be readmitted as a new member by initiation. Any member of the PMWA accepting employment in the coal industry in any mine not under contract with the PMWA or International Union District 101, be immediately dropped from membership."

There is no provision in any constitution or by-law for the payment of dues to the local union or the District for dues while working in the coal industry anywhere else except at the mine over which the local union has jurisdiction. There is no provision for the payment of any

dues to the Welfare and Retirement Fund and no dues are used for the administration of the Welfare and Retirement Fund (App. P. 110). Bosse testified that he knew what the by-laws and constitution provided with regard to dual membership and that he was present at the convention which adopted the amendment as hereinabove set forth. He later submitted that to his local union as President and voted for the ratification of it (App. P. 117). He also knew what the plan of benefits of the Welfare and Retirement Fund provided (App. P. 117). Ude admitted the same thing.

Bosse further admitted that he knew that the by-laws of the UMW provided that he would not be eligible for membership if he maintained membership in the PMW.

The constitution and by-laws of the UMW (Res. Ex. 2, Ex. Vol. P. 86-87 first rejected by the Trial Examiner but later admitted into evidence) provide:

> "Any member accepting membership in the Industrial Workers of the World, the Working Class Union, the One Big Union, or any other dual organization, or membership in the National Chamber of Commerce **** shall be expelled from the United Mine Workers of America, **** and no members of any such organization shall be permitted to have membership in our union unless they forfeit their membership in the dual organization immediately upon securing membership in the United Mine Workers of America. ****"
>
> "Sec. (3) No mine shall be under jurisdiction of more than one local union. *****"
>
> "Sec. (9) Any member going to work in a non-union mine shall forfeit his membership and can be reinstated only by complying with the laws relating to such offense in the District where such offense is committed****"
>
> "Sec. (12) Retired members and disabled members

receiving aid and those receiving state workmen's compensation payments, also members temporarily unemployed through no fault of their own, shall pay one dollar and twenty-five cents per month dues to be forwarded by the local union to the District Secretary ****"

"ART. XVIII Sec. (7) When any officer of the International Organization, or of any District, Sub-District or local thereof, or when any member of the United Mine Workers of America, is charged with fomenting, leading or encouraging a dual union, or a dual movement within the Organization, upon charges being filed with the International Executive Board, notice to such accused person or persons of not less than five days of the time and place of hearing shall be given, and a hearing of said charges shall be had. If upon such hearing the International Executive Board finds such officer or officers or person or persons guilty, it may order the removal of such officer from office and his expulsion from the Organization or suspension from membership, and in the case of a member accused and found guilty the Board may order the expulsion of such member from the organization or the suspension of his membership. *******"

The foregoing constitution and by-laws were identified by Kenneth Wells an official of the UMW who testified. The local union by-laws of 167 do not have any provision with regard to dual membership, they provide for death benefit to be paid its members by assessment and other benefits for unemployment, etc. be collected under the check-off. (Res. Ex. 1) (Ex. Vol. P. 85) There are three distinct death benefits payable to PMW members, the first being by the District, the second by the local union all of which are paid out of dues and the third by the Welfare and Retirement Fund out of the contributions on coal tonnage.

The United Mine Worker organization to which Bosse and Ude now belong have a Welfare and Retirement Fund

which is financed in the same manner as the PMW Fund by payment of moneys to that Fund by the operator for each ton of coal mined.

The UMW eligibility requirements are set forth in Respondent's Exhibits 3 and 4. (Ex. Vol. P. 85-92) Survivors benefits are $5,000.00 provided the man is regularly employed at a classified job. Retirement benefits require age 55 on date of application; 20 years service as an employee in a classified job for an employer in the coal industry; must permanently cease working following regular employment for at least one full year as an employee in a classified job for an employer signatory to the National Bituminous Coal Wage Agreement (this agreement is between United Mine Workers and operators under contract with United Mine Workers only).

As testified by Kenneth Wells, a special International representative for the UMWA (App. 157-167) the UMW pension at age 55 is $115.00 a month. This plan covered Bosse and Ude at the Eagle Mine. They have the same benefits at that mine as at every other UMW mine contributing to the fund. The Trial Examiner asked what would happen if they worked only a short time and then left that job and it was agreed that they would not be entitled to anything. It was further agreed that if they left and even went outside the industry before age 55 they would not be entitled to anything. As the witness said "no one is entitled to a pension until they are 55". He further said that if a man worked at a PMW mine for 29 years and then on his 30th year worked in the coal industry under UMW at the end of the 30 years if he was 55 years of age he would get a full pension from the UMW Fund. He cited examples of where supervisors of employees who were not members of the union worked in the industry for 30 years and served the last year as a

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United Mine Worker in classified work they would receive the pension.

Robert G. Moss an actuary from St. Louis, Missouri who has worked with the Midwest Fund testified in substance that the Midwest Welfare Plan was designed for a particular mine and the objective was to set up a method or formula that would protect the older men and the younger men because it was never known at what time when the mine would run out. (App. 177) The Plan provided for a full funding of benefits and after a man was funded no more allocations were made. Generally speaking the older men who are nearest retirement would be funded first. For example at age 35 a man would be completely funded for $9,519.00 which would produce $19,878.00 at age 55. In the actuarial assumptions mortality and turnover were taken into consideration by way of people dropping out, dying before they retired without leaving dependents and other situations in which funds are released (App. 181). If a man quits and does not qualify to draw any allocated money this goes into the contingency reserve which is then used to fund other men who will qualify. "We just hoped that there would be enough turnover to provide the benefits that the plan called for to widows and survivors and if there wasn't enough benefits, these people that called for benefits under the plan simply wouldn't get them." (App. 188) When the plan becomes fully funded then the contributions of Peabody would be cut down (App. 189). The use of the words "allocated funds" is again only a bookkeeping entry (App. 191). He further said "actually, these allocations are completely misleading. They are primarily there in order to handle the situation when the plan is terminated when the mine runs out how do you stand, who gets priority. That's the real reason for them. Other-

wise, to the extent that funds are coming in, for example if this man hits 55 and has only $10,000.00 and the plan is still operating, he retires at $115.00 and he keeps getting allocations even though he is not working. If the mine is abandoned and he runs out of allocated moneys after retirement he could then draw upon the contingency reserve" (App. 195). He then explained the UMW plan as being a pool plan without the bookkeeping involved as in the PMW Fund. He further said that the plan was actuarially sound to the extent that money was available to pay the benefits and if there was not money the benefits would have to be cut down. He relied upon the turnover of employees to provide the additional fringe benefits for payment to widows (App. 204). Whether or not the fund can pay all benefits as proposed depends upon the life expectancy of the mine (App. 208). There is no philosophical difference between the common pot finding (UMW) and the allocation method, other than this is a bookkeeping procedure which really has no bearing except when the plan is terminated and the mine runs out and then assigns priorities with respect to this money (App. 214). Under the UMW common pot fund if their contribution should drop sharply we would have the same funding problem that we have at this mine. They had a problem like that a few years back when they had to cut back benefits simply because the retired force got to be too large for the working force. Their benefits were reduced from $100.00 to $75.00. Comparing Exhibit 4 (UMW Plan) (Ex. Vol. P. 91) and the PMW (Ex. Vol. 43-61) Plan the widows benefits provided in the UMW Plan are much less. Under the common pot theory as long as there is any money, benefits will be paid, but under the allocation plan priorities will limit the payments, so that instead of having all the older fellows get all the money there was a dividing up

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on an equitable basis so that if the mine closed down benefits would be paid on an equitable basis (App. 217-218). He further said "the primary interest of a plan is to provide benefits to people who retire under it, and not people who leave the plan prematurely***** Many of the typical pension plans do not provide death benefits, widows benefits or anything else to somebody who has terminated their service." If a person leaves the coal industry and goes into something else he could draw his allocated moneys but the UMW Plan does not have any such provision. (App. 221)

Actually the facts are undisputed in the instant case. Bosse and Ude were still working under the UMW local union at the time of the hearing on March 11, 1968 and had never tried to rejoin the PMW or to obtain employment under the jurisdiction of the PMW at any mine operated under a contract with PMW.

Peabody Coal Company paid to the Welfare and Retirement Fund of PMWA to fund pensions for employees at Midwest, including Bosse and Ude and also paid to the Welfare and Retirement Fund of UMWA to fund pensions for employees at its Eagle Mine where Bosse and Ude are now employed, including Bosse and Ude, and also including prior service funding for them at Midwest Mine.

THE PRESENT SITUATION

The Trial Examiner held that the Local Union had the right to deny union membership but that it had to accept a service fee from the charging parties to make them eligible to draw their retirement pension money. He further held that the date of the refusal to accept service fees was the beginning of the six month period which bars proceedings under Sec. 10(b) of the Act.

The Trial Examiner further held that even though the Union Membership requirement was valid while they were working at the mine because of the valid Union Shop Agreement, it was an Unfair Labor Practice under Sec. 8(b)(1)(A) of the Act for them to require union membership after ceasing to be an employee.

He ordered the Local to put up a bond to guarantee the payment of allocated money; to accept service fees and to notify the Trustees of the Retirement Fund that INSOFAR AS THE REQUIREMENTS IN THE UNION MEMBERSHIP AND THE PLAN ARE CONCERNED BOSSE AND UDE HAVE, AT ALL TIMES SINCE JANUARY 16, 1967 REMAINED MEMBERS IN GOOD STANDING IN THE RESPONDENT LOCAL.

The National Labor Relations Board ordered the Local Union to accept the "REJECTED DUES" as service fees and notify the Trustees that Bosse and Ude shall remain so long as they make periodic service fees. The Board further ordered the Local Union to quit threatening employees of Peabody with loss of allocations in the event they quit their jobs. Of course there is not one iota of evidence in the record that anybody was ever threatened.

The Circuit Court of Appeals for the Seventh Circuit held that the Local Union had violated 8(b)(1)(A) of the Act. The Court held that the valid union security agreement did not fall within the protection of the proviso to Sec. 8(b)(1)(A) of the Act. The Court emphatically stated that it was not necessary to have any actual proof of restraint or coercion.

The Court lightly touched upon the subject of requiring the coal industry to pay double pensions to job jumpers,

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and completely ignored the contention that this would place an undue burden upon Interstate Commerce.

The Court further held that even though Bosse and Ude knew that they had lost their union membership when they joined UMWA the six month period under Sec. 10(b) of the Act did not begin to run at that time but began to run when the dues were returned to them by the union.

CERTIORARI SHOULD BE GRANTED BECAUSE:

1. The Circuit Court of Appeals has totally and completely misinterpreted the provisions of Sec. 3 of the Reporting and Disclosure Act of 1959, and if allowed to stand will require the Respondent to violate Federal Law.

2. In its decision both the Board and the Circuit Court of Appeals have relied upon cases wherein there is no valid union shop agreement, and which are not applicable to the instant case and result in a decision which is contrary to the applicable case law.

3. The Board and the Circuit Court of Appeals have misconstrued and held contrary to other decisions in holding that there is a restraint and coercion where the positive testimony is contrary and where employees testify that the ultimate result was brought about by their own conduct and desire.

4. The Board and the Circuit Court of Appeals have misconstrued the phrase "affecting interstate commerce" as laid down by this Court in actually encouraging employees to job jump in an effort to try and get two pensions, and to place a burden upon interstate commerce by requiring an industry to fund two pensions, which was never intended under the law.

ARGUMENT

I. The service fee concept as "legislated" by the Board and the Court will result in requiring a violation of existing federal law.

Under the Act the Union and the Operator are required to bargain upon Pension and Welfare matters for employees. Under the contract and plan in the instant case, because the pension is being funded as we go along, it is necessary for the Union to bargain for continued payments so as to fund for even retired men after they retire. In other words, when they retire their pension is not funded, but future allocations are made each year in an effort to reach that point. If it is not reached, then they are eligible to participate in the Reserve Fund so long as it has any money. It is illogical to say that employees must remain members because of the Union Shop agreement as long as they work at mine, but after they quit they do not have to remain members. Further, if they pay dues they must be allowed to vote, and after 10 or 15 years, these men who quit and go to another union to obtain employment could, by their votes control the PMW local and help to destroy it and serve the purposes of the UMWA. We don't believe the law ever intended such a result.

Assuming for the sake of argument, which we do not admit, that the Board has the power to order Local 167 to accept some form of dues or service fees, how and what shall they be?

The Constitution and By-laws make a distinction between men who retire and qualify for a pension (1% of pension), those who quit their jobs and leave the industry ($1.45 per month). This $1.45 per month includes 35¢ per month for the District Death Fund, for which he remains eligible

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(which is distinct and different from the death fund of the Welfare Plan) and 35¢ for the general fund of the District. Are these men to pay $1.45 and still be eligible for the District Death Fund and also the UMWA death fund where they are now working? There is only one category for men working in the coal industry, and that is 75¢ per month plus 2% of total earnings. These men are working in the coal industry and don't tender these dues as the constitution requires, and the Board now presumes to tell the Local that they are to get by cheaper than the men working in PMWA mines, and still get all of the benefits of the men still working in the PMWA mine. We don't believe the Board has this power.

If the Board's Decision is allowed to stand, it will place Local 167 in a position of violating Section 101 (a) (1) of the Labor Management Reporting Disclosure Act of 1959.

We believe this to be a case of first impression with regard to this so-called matter of service fees instead of union dues. We realize that under the NLRA provision is made for maintenance of membership where it is provided by contract. There is also provision under the Act for union shop agreement. We know of no authorization for the combination of the two but we suppose if there were there might possibly be some combination worked out by a negotiated contract between the employees and the employer. However such is not the case here.

They have a valid Union Shop Agreement under the Act. General Counsel's concedes that fact, but goes on to say that after someone voluntarily quits he can drop his membership and then try to claim benefits that were contributed under the union contract which required him to remain a member of the union.

The Co-Trustees of the Welfare and Retirement Fund do not run a labor organization and it cannot be construed as a labor organization. They have no authority whatsoever to accept periodic dues or service fees from anybody.

The local union by-laws provide for many types of union benefits payable out of dues and have no provision whatsoever for an associate member or some type of strange membership which General Counsel seeks to impose. We just don't think that the law gives the Board that power.

We sincerely believe that Section 101 of the Reporting Disclosure Act of 1959 creates serious problems along this line.

That Act provides that every member of a labor organization shall have equal rights to nominate candidates and to vote upon all matters particularly in the case of dues and assessments. That Act provides for protection for the members of a labor organization. It is obvious that if these people are willing to pay any service fees they have to pay them to Local 167. Local Union 167 could not set these fees or raise them without a vote of the membership and we fail to see how there could be a vote of the membership that would be fair to these small groups of men. Further they would not be members of the union and would not have a right to vote on other union affairs. It just simply creates an impossible situation which was never contemplated under the present law.

As the Trial Examiner said in his Decision if we wanted to correct certain matters perhaps we had better get congress to act upon them. This is a field that we think is not covered by the present law and we don't think the Board can interject itself into the field of legislation.

We sincerely believe that if we follow the directive of the Board in the instant case and take service fees from

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non-members of the union that we would be violating the Reporting And Disclosure Act of 1959 and would be subject to its penalty. We respectfully suggest that the Board has no authority to compel us to violate another act.

In conclusion on this point, we cannot help but comment on the fact that the Board reaches its conclusion that we can charge dues or service fees to non-union members because "Said Constitutional provision does not prohibit the continued payment of service fees as a means of maintaining eligibility under the Welfare and Retirement Pension Plan". By the use of this negative approach the Board is grasping at straws.

To place the stamp of approval upon the so-called service fee method without statutory requirements for voting approval of the same is for the Court to say that it is creating a super type of union membership that can derive benefits out of dual unionism. Sec. 3 of Reporting and Disclosure Act of 1959 provides only for the vote of members in good standing. The Board and the Court have held that the Respondent must say that Bosse and Ude are in good standing even though they are not members.

Because of the enormity of the sums of money involved in the dozens of cases now pending similar to the instant case involving nearly a million dollars, and probably more to come, the parties deserve the final binding opinion by this Court to guide the administration of a large Welfare Fund so as not to lay them open to possible liabilities. We respectfully submit that if this question is finally resolved by this Court that the Co-Trustees can properly administer their duties, but not without the reassurance of this Court that they are following the law as it was intended by Congress.

* * * * * * *

II. The six month period Sec. 10(b) of the Act started

to run from the date the charging parties joined the UMWA.

Section 10(b) of the Act provides that no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the Charge with the Board.

The Charge in this matter was filed on August 1, 1967 which is more than 6 months after their membership was terminated.

The Trial Examiner held that the date when the union refused to accept the dues tendered by Bosse and Ude was the date the unfair labor practice was committed. This was affirmed by the Board who said that March 15, 1967 being the date when the tendered money was returned was the date from which the 6 month period started to run.

We believe that the material date is the date that Bosse and Ude took up employment at the River King Mine and joined the UMWA. It is undisputed in the evidence that this happened on January 17, 1967.

The local union was bound to follow the constitution of the District which provided on page 55 (G. C. Exhibit 2, Exhibit Vol. 1-6) "local unions may adopt such laws for their government as do not conflict with the laws of the International, District Union, or joint agreements". Article VI of the District Constitution provided that Bosse and Ude should be immediately dropped from membership upon accepting employment at River King. This amendment was adopted at a convention held for that purpose by PMWA. Bosse testified that he was president of the local union and attended that convention as a delegate and he knew if he quit his job and took a job in a UMWA mine he lost his membership in PMWA. Further, as president of Local Union 167 he submitted this amendement

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to the Local and it was unanimously adopted. Likewise Ude testified that he knew what the constitution provided and that he was present at the local meeting. Both men testified that they joined the UMWA in January of 1967.

The local union had no authority to accept dues because of the District Constitution and the Co-Trustees of the Welfare Fund had no discretion whatsoever to provide any benefits, because once they were notified by the Union that the membership had been dropped they could no longer rule that the men were eligible for benefits unless some court of competent authority might tell them that they had to.

We cannot see how either the Trial Examiner or the Board could so hold because it seems so clear that under the documents, which are undisputed, the loss of membership which resulted in the inability of the local union to accept dues began in accordance with the District Constitution on the day they took up employment at the River King Mine on January 17, 1967.

The Board more or less takes the position that this is a continuing matter culminating in the refusal to accept dues and that the date of the refusal is a controlling date.

This was squarely decided by the United States Court of Appeals, 3rd Circuit, **N.L.R.B. vs. Pennwoven, Inc.**, 194 F. 2nd 521, where the Court held that the six months limitation was a precise limitation established by Congress and said: "We conclude that when the respondent in this case failed to call these three people back to work and they knew it and know, or thought they knew, why they were not being called back, the respondent's act of discrimination had taken place and his liability accrued thereupon. We do not think it continues indefinitely but is barred if charges are not brought within six months."

To the same effect, see Administrative Decision of General Counsel, 1961 CCH N.L.R.B. 10,570, Case No. SR-1615 and **N.L.R.B. vs. Childs Co.**, (CA2) 21 LC 66,867, 195 Fed. 2nd 617.

We believe that since the holding by the United States Supreme Court in the case of **National Labor Relations Board vs. Allis Chalmers Manufacturing Company, et al.**, 55 LC 11,972, 388 U.S. 175, there is no question but what the local union had the right to regulate its own affairs and deny membership to the charging parties.

In our opinion there is even a more important reason why the Board is in error in using the date of the refusal of dues as the starting point for the 6 months period. The charge in this matter as filed by Bosse and Ude charged the Respondent Local 167, the only parties to this proceeding, with the violation of Section 8(b)(1)(A) and 8(b)(2). However the Complaint as issued charged only a violation of 8(b)(1)(A). This Section merely makes it an unfair labor practice for a labor union to restrain or coerce an employee in the exercise of the rights guaranteed in Section 7 and specifically reserves to the union the right to prescribe its own rules with respect to the acquisition or retention of membership. Section 7 guarantees to an employee the right to form or join a labor organization or refrain from doing so except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3). Section 8(a)(3) protects the Union Shop Agreement applicable in the instant case under which every dime of money has been paid into the Welfare and Retirement Fund and which said contract is still in existence. This portion of the Argument is also applicable to other points which we raise and we will expand upon it more fully later. However we point out

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that under the decision of the Trial Examiner and as affirmed by the Board there has actually been no violation proven and even assuming there had been, under the Act the only violation would have to do with union membership and therefore the beginning point would start with the denial of union membership.

We respectfully submit that the Motion to Dismiss should be allowed, or in the alternative that this matter should be clearly defined for the guidance of union officials and Co-Trustees of Welfare funds.

III. The Act guarantees to the Union the right to prescribe its own rules for membership, and this may in some instances carry with it the denial of some economical benefits.

In its decision and order the Board said (172 NLRB No. 189 — App. B):

> "As found by the Trial Examiner, it is clear from the record that the effect of the Constitution and By-Laws of District No. 1, Progressive Mine Workers of America, as amended in April 1966, is to prohibit dual unionism when employees go to work at a mine where the United Mine Workers is the bargaining representative, although the clause itself is worded in terms of being dropped from membership 'upon accepting employment in the coal industry in any mine not under contract' with the Progressive Mine Workers. Said Constitutional provision, however, does not prohibit the continued payment of service fees as a means of maintaining eligibility under the Welfare and Retirement Pension Plan. Within the meaning of our decision in **Coal Producers' Association of Illinois**, 165 NLRB No. 31, and of our decision here, the violations we find and here remedy are based upon the rejection of said service fees and resulting deprivation of rights under the Plan — not the denial of PMW membership as such. We are not here dealing with ac-

quisition or retention of membership in the sense protected by the proviso to Section 8(b)(1)(A), and our decision is not intended to require the Respondent to confer membership status on Bosse and Ude."

The Board then ordered:

"1. Cease and desist from:

(a) Refusing to accept the union dues of Melvin J. Bosse and Marvin Ude as a service fee for continued participation in the PMW Welfare and Retirement pension Plan because said individuals left the Midwest Mine of Peabody Coal Company to work at a mine where the employees are represented by the United Mine Workers.

(b) Threatening employees of Peabody Coal Company at the Midwest Mine with the loss of allocations held for them incident to the said Plan in the event they leave Midwest Mine to work at a mine represented by the United Mine Workers.

(c) In any like or related manner restraining or coercing employees of Peabody Coal Company at the Midwest Mine in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Accept the rejected dues of Melvin J. Bosse and Marvin Ude, for 1967 and 1968 as service fees if again tendered, and notify the trustees of the Plan that Bosse and Ude have been eligible continuously for benefits under the Plan, and shall remain eligible so long as they make the periodic service fee payments uniformly required."

Section 8(b)(1) says in no uncertain terms "that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

The District Constitution, which is binding upon the

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Local Union, (G.C. Exhibit 2) provides very clearly (Article VI-Revenue-Sec. 5 found in the amendments in the back of the Exhibit) any member of the PMWA accepting employment in the coal industry in any mine not under contract with the PMWA or International Union District No. 101 be immediately dropped from membership." The facts are undisputed that Bosse and Ude of their own violation gave up their employment at the Midwest Mine and took up employment at a mine which was under contract with the UMW. Is that provision of the Constitution legal or isn't it?

Out of one side of its mouth the Board says it is legal, but out of the other side, it says that the Local must establish a new category of membership and set up a new classification of dues applicable only to men who voluntarily give up their jobs and quit.

It must be remembered that these two men now belong to the UMW whose By-Laws have the same provision against dual membership. What if in the final analysis it should be held that they can pay dues into both unions and be entitled to all of the death benefits, welfare benefits and everything entitled to membership in both organizations?

In 1963 in Administrative Decision NLRB, General Counsel Case No. SR-2599, March 6, 1963, a union member joined another union so that he could hold a particular job. The first union notified him that it was contrary to the union constitution for a member to hold dual union membership. He then alleged union restraint in threatening to expel him and the General Counsel said:

> "In view of union A's statutory right to make its own rules for the acquisition and retention of membership, it could not be said that union A had violated Section 8(b)(1)(A) by refusing to accept the member's

dues. Moreover, there was insufficient evidence that the union had discriminated against him in the matter of referrals."

In an earlier Administrative Decision, Case No. SR 15, July 16, 1959, a worker was denied Union membership because its constitution required continuous work in the industry and the General Counsel said:

> "Likewise, the withdrawal of the worker's union membership in accordance with the union's constitution was not unlawful. A labor organization has the right to prescribe its own rules with respect to the acquisition and retention of membership in the union."

This proposition has been nailed down once and for all in the case of **NLRB vs. Allis Chalmers Manufacturing Company**, 338 U.S. 175. In that case members of the union were fined for crossing the picket line, and the Seventh Circuit Court of Appeals held it to be restraint and coercion, but the United States Supreme Court reversed it and held that there was no restraint and coercion, and in very strong language said:

> "It is clear that the fined employees involved herein enjoyed full union membership. Each executed the pledge of allegiance to the U.A.W. Constitution and took the oath of full membership. Moreover, the record of the Milwaukee County Court Case against Benjamin Natskie discloses that two disciplined employees testified that they had fully participated in the proceedings leading to the strike. They attended the meetings at which the secret strike vote and the renewed strike vote were taken. It was upon this and similar evidence that the Milwaukee County Court found that Natskie had by his actions become a member of the union for all purposes. * * * * Indeed it is and has been Allis Chalmers' position that the Taft Hartley Prohibitions apply whatever the nature of the membership."

In the above case the Court pointed out that the job

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rights of the employees were not involved and not before the Court. That is also true in the instant case because these employees knew what the constitution provided, they even voted for the amendment to the constitution. They voluntarily quit their employment knowing what they were doing and took up jobs at another mine. There is not one iota of proof in the record of any restraint or coercion which caused them to give up their job rights.

Under the Act the Union and the Operator are required to bargain upon Pension and Welfare matters for employees. Under the contract and plan in the instant case, because the pension is being funded as we go along, it is necessary for the Union to bargain for continued payments so as to fund for even retired men after they retire. In other words, when they retire their pension is not funded, but future allocations are made each year in an effort to reach that point. If it is not reached, then they are eligible to participate in the Reserve Fund so long as it has any money. It is illogical to say that employees must remain members because of the Union Shop agreement as long as they work at mine, but after they quit they do not have to remain members. Further, if they pay dues they must be allowed to vote, and after 10 or 15 years, these men who quit and go to another union to obtain employment could, by their votes control the PMW local and help to destroy it and serve the purposes of the UMWA. We don't believe the law ever intended such a result, even though the Circuit Court of Appeals affirmed the decision of the Board in this respect.

IV. The evidence in the instant case shows that there was no violation of Sec. 8(b)(1)(A) of the Act.

If this were a case involving the discharge of Bosse and Ude because of dual unionism, it would be a completely different situation covered by Sec. 8(b)(2) of the Act.

These men were not discharged, but quit voluntarily — almost in a friendly situation, and even admitted under oath that they had no complaint against the union which caused them to quit.

There is no authority whatsoever to justify the Decision and Order of the Board in a case where there is a valid Union Shop agreement. We do not believe General Counsel even stated a valid case based upon his theories. He stated to the Trial Examiner:

> "At this time let me state it is not General Counsel's contention that the denial of membership to Mr. Bosse and Mr. Ude is a violation of the Act. We contend only that it is a violation of the Act for them to deny them the right to remain eligible for the pension and welfare plan because they would not be eligible for membership.
>
> TRIAL EXAMINER: Before the trial began this morning we had an off-the-record discussion of the issue or issues in this case. I thought at that time that the parties agreed that the issue, or an issue in this case is whether or not the respondent union violated the Act by terminating the membership of these two individuals because they went to work for a mine where there was a United Mine Workers contract, causing the allocated funds to be forfeited.
>
> Now, is that the position of the parties?
>
> MR. STEVENS: I think there is a refinement on this. It is because the respondent is taking the position that when membership is lost that they have then refused to accept service fees for administering the pension fund. General Counsel does not contend that they have to allow Mr. Bosse and Mr. Ude to be members of the union, but that they must continue to accept dues or service fees necessary to administer the pension and welfare plan in order that they may continue to be entitled for any benefits under it and not to have their allocations forfeited." (App. 124-125)

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"For the purpose of clarification, I will say General Counsel does not contend, as I have stated, that Progressive Mine Workers must extend membership to people who have quit or gone to other employment. We don't contend they have to extend membership. Our contention is, though, they cannot refuse to accept service fees for administering the welfare and pension fund because of their non-membership or because they are not eligible for membership." (App. 128)

"May I add to that? That they cannot refuse to take these because he is not eligible for membership in the union. In other words, they might refuse to take these fees for some other purpose, but when they connect it to the fact that they are not eligible for membership in the union, therefore, we refuse to accept the fees, this is the thing which we believe makes it illegal.

"TRIAL EXAMINER: In order that the record will be clear, this morning while we were discussing the issue or issues in the case, I pointed out that it seemed to be at issue here whether or not the amendment to the constitution made in 1966, namely, to Article VI, Revenues, Section 5, was legal, as far as it states 'Any member of the P.M.W. of A. accepting employment in the coal industry in any mine not under contract with P.M.W. of A. or International Union, District 101, be immediately dropped from membership.' I stated from my study of the pleadings in the case that I thought that an issue here, as pleaded by the General Counsel, was whether or not this provision as applied to Mr. Bosse and Mr. Ude was illegal.

"Now, is it agreed by the parties that this is an issue in the case?

"MR. STEVENS: I don't think that we contended applying that provision causing loss of membership, as such, is the thing we are reaching. It is when the union considered this, together with their requirements of the retirement plan and said because they are not members, because they are not members pursuant to

our constitution, we will not allow them to pay a service fee, whereas other people, as the testimony reveals, can cease working and continue to pay service fees as long as they are eligible for membership. It is only when they lose their eligibility for membership that the respondent refuses to accept service fees from them.

"TRIAL EXAMINER: And what you are referring to as service fees are what the union refers to as union dues?

"MR. STEVENS: Yes." (App. 150-151)

"That despite the requirements of this plan, the employees who formerly worked at Midwest should not be deprived of their allocated funds, that although it may be possible for them to work some place else for a long enough time to have some pension rights arise under a different plan, there is no guarantee that they will ever be able to work long enough to have those rights. There can be a number of things happen before they ever attain age for retirement, and even though technically the eligibility requirements might be possible for them to meet, this is not reason or ground why they should be deprived of a pension plan, which they now are entitled to.

"Now, these plans could be made mutually exclusive, they could provide, as in the past one of them has, that where people are getting payments from the different plan, that the limit of the liability for P.M.W. plan will be only the difference between what the other plan pays and the maximum under the P.M.W. plan, as I stated earlier, and I think counsel said, at a time employees were getting, I think, $75 from a United Mine Workers plan and $25 more from the Progressive Mine Workers plan to make up the total amount that was then being paid, a hundred dollars. There is nothing to prevent the plans from doing this, and I don't think that it is at all relevant if the plans haven't made this type of provision to the issue of whether or not employees should have their rights

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> under the plan taken away from them because they join a different union and are ineligible." (App. 162-163)

The foregoing theories do not state a violation or cause of action under Sec. 8(b)(1)(A) of the Act. There must be actual proof of restraint and coercion as covered by the Act, keeping in mind that under the facts in the instant case, the Act must be applied to a union shop agreement, which was in effect when the Pension Fund was created, and has been in effect ever since.

In 1960, in the case of **NLRB v. Drivers, Chauffeurs, Helpers Local Union 1639, et al.**, 362 U.S. 274, 39 L.C. 66,-351, the Supreme Court refused enforcement of a Board Order (under different facts than in the instant case because picketing was involved) saying:

> "We conclude that the Board's interpretation of Sec. 8(b)(1)(A) finds support neither in the way Congress structured Sec. 8(b) nor in the legislative history of Sec. 8(b)(1)(A). Rather it seems clear, and we hold, that Congress in the Taft-Hartley Act authorized the Board to regulate peaceful 'recognitional' picketing only when it is employed to accomplish objectives specified in Sec. 8(b)(4); and that Sec. 8(b)(1)(A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof — conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes.'

In the above case the Court also recognized the rights of employees to refrain from union membership as guaranteed by Section 7 of the Act, but also recognized the exception that that right might be affected by an agreement authorized in Sec. 8(a)(3), which is exactly what we have in the instant case.

In the case of **Local 138, Int'l Union of Operating Eng. v. N.L.R.B.** (often referred to as the Hagerty case), 321 Fed. 2d 130, 47 L.C. 18,352, the Second Circuit said "The restriction of the Fund's coverage to men who maintain their financial good standing with the union discriminates against non-members.", but then added as a footnote the following:

> "Of course where a valid union security agreement is in effect and is enforced, the benefits of a welfare fund are properly limited to those who alone may be employed consistently with the agreement."

After the foregoing case was remanded to the Board, it came back again to the Second Circuit (56 L.C. 12,301) (Cert. Denied) 391 U.S. 904, and the Court said:

> "The proviso to Sec. 8(a)(3) of the National Labor Relations Act authorizes unions and employers to enter into union security agreements for the limited purpose of compelling employees to pay union dues and fees. Moreover, the Supreme Court has made it clear that employers cannot refuse to bargain over any union security proposal * * * We have just discussed how Congress has provided unions with a specific means for meeting the problem of 'free riders' which Local 138 has here tried to meet * * * if the Union wants union security, it may bargain for it. It may not short circuit the system Congress has established by attempting to gain union security through an exclusive hiring hall. * * *"

As we point out later under another part of our argument, neither of these men lost anything whatsoever by way of wages, welfare or otherwise by what happened. They voluntarily quit and went to another mine covered by another welfare and pension system, which guaranteed them a pension for the years spent at Midwest Mine, and therefor lost nothing.

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There is no proof in this record whatsoever that Bosse and Ude or any other employee was afraid to leave Midwest because of loss of his pension. There is no proof in the record that they were induced to leave on account of the welfare. Their only reason for leaving was that they felt maybe the mine might work out and that they were better off to get a job at another mine that might have a longer life. Neither the Trial Examiner nor the Board can draw inferences where there is no evidence to support such inferences. Such findings must be based upon fact and there are no facts in the instant case to bear out any such findings.

The coal industry adopted a pension system in 1946 which from the very inception was set up for the union membership of that union. This has been long recognized by the Courts as being a valid, legal, existing pension system and we know of no case to the contrary.

One of the earliest cases in connection with union membership requirement was that of **Upholsters International Union of North America vs. Leathercraft Furniture Company, et al.,** 82 F. Supp. 570, 16 L.C. 64,972. Said case involved private litigation but we submit that the holding of the Court is quite pertinent to the instant case. Suit was brought by the Union to compel the Company to make certain payments pursuant to agreement to Plaintiff's Social Security Department. The Defendant Company failed to make such contributions and asserted that the fund was not lawful because the Union's By-Laws and Regulations did not provide for benefits for all of the Defendant's employees and the Fund had not been established for the sole and exclusive benefit of the employees pursuant to Section 302 of the Act. We set out a significant part of the Court's holding as follows:

(2) Although Sec. 302(c)(5) speaks of "the em-

ployees of (the) employer," it does not mean all the employees of a single employer. It is seldom, if ever, that all the employees of an employer are members of a single union. Moreover, except where the employees of one employer are small in number, rarely is one union the bargaining representative for all the employees of a single employer. To say that Sec. 302(c)(5) required the rules and regulations governing a trust fund should provide benefits for all the employees of a given employer would have made impossible the existence of any such trust fund. Prior to the passage of the Act, benefits of a trust fund were restricted to members of the labor organization whose bargaining power was instrumental in the creation of the fund. In the absence of a clear intent on the part of Congress, which was thoroughly aware of the situation as it existed prior to the Act, to make a change in this respect, it is not improper for the union to provide as one of the conditions of an employee to receive benefits from such fund that he be a member of the union at the time benefits become due. See **Van Horn v. Lewis, et al.**, D.C.D.C., 1948, 79 F. Supp. 541, 543, 544. Such provision does not deviate from the requirement that the fund shall be for the benefit of the "employees of (the) employer".

The present case is on even firmer footing since in our case all of the employees of the employer, except those exempted by the law, are covered by the contract and are members of the Union, as a consequence, there can be no discrimination because all employees are eligible and there are no other employees against whom discrimination could be asserted. Consequently all employees are covered and all employees are members of the Union by means of a valid Union security agreement which in no way transgresses either the letter or the spirit of the Act.

In further support of our position we would cite the case of **John L. Lewis, et al. vs. Mill Ridge Coal, Inc.**, 188

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F. Supp. 4 (1960), 41 L.C. 16,683. This was a suit by the Trustees of the United Mine Workers of America Welfare and Retirement Fund against signatory operators of a collective bargaining agreement who were obligated to pay into the Union Fund a specified amount pursuant to the Agreement. One of the defenses raised was that the Trustees were committing an unfair labor practice in providing benefits of the Fund to only those employees of the operators who were members of the Union. The collective bargaining agreement between the parties had a union security clause as to Union membership which was practically identical with that in the instant case. The court upheld the validity of the fund and we point out verbatim the following pertinent language in the decision:

> "If Defendant complied with this agreement (Union Security Clause) all of its employees except exempted classifications, which are generally speaking supervisory personnel not covered in any manner by the contract, were members of the Union and were thus all entitled to benefits of the Welfare and Retirement Fund under the National Labor Relations Act, 29 U.S.C.A. Sec. 158(a)(3) such a closed shop agreement is legal and it does not violate any law of Kentucky. Therefore, the allegation that the Plaintiff Trustees and the Union are committing an unfair labor practice by providing benefits of the Welfare and Retirement Fund to only such of Defendant's employees as are members of the Union appears to be a spurious defense."

It would seem to us that the Court could come to no other conclusion than it did in the **Mill Ridge** case, supra, because the principle of union membership requirement was established early in the game when the United Mine Workers first adopted their written plan of benefits. This plan is set forth insofar as union membership is required in the case of **Van Horn v. Lewis**, 79 F. Supp. 541, 15 L.C.

64,596, decided on June 23rd, 1948. In that case, the three Co-Trustees could not agree upon a written plan of benefits. Mr. Van Horn, one of the trustees, filed suit, asking the Court to restrain the other trustees from putting the plan into effect. One of the provisions of the plan as set forth "Be it further resolved, that a pension of $100 per month shall be paid, subject to amendment or modification at any time as experience in the operation of the fund may dictate or require, to each eligible and qualified member of the United Mine Workers of America who on May 29, 1946, attained or thereafter attained the age of 62 years and who has served 20 years in the coal industry in the United States and who has retired from the bituminous coal industry in the United States on the date subsequent to May 28, 1946, * * * * *."

The Court further said "One thing should be kept eternally in mind in this connection, and that is that this agreement was not made between the operators and the employees. It was made between the operators and the United Mine Workers of America, which is a very different proposition."

"No employee of the operators who is not a member of the United Mine Workers of America receives any benefit whatever from this pension arrangement. The operators are required to pay ten cents a ton. This arrangement doesn't increase or decrease that amount by one iota, not in any way at all."

In the Court's finding of fact, it found specifically "In substance, the plan provided for pensions of $100.00 to be paid to the eligible and qualified members of the United Mine Workers of America who on May 29, 1946, or thereafter, attained the age of 62 years and who had served 20 years in the coal industry in the United States,

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and who had retired from service in the bituminous coal industry on a date subsequent to May 28, 1946."

In the Court's conclusions of Law, the Court found:

> "1. The Welfare and Retirement provisions of the National Bituminous Coal Wage Agreement of 1947, made between the operators signatory thereto and the United Mine Workers of America, do not violate either the letter or spirit of the Labor Management Relations Act, 1947.
>
> • • • • •
>
> "3. The Trust Agreement as set out in the National Bituminous Wage Agreement of 1947 provides for payments of benefits to the members of the United Mine Workers of America."

We do not find where this flat union membership approval in the **Van Horn** case has ever been distinguished or overruled by any other Court and we most certainly submit that it is applicable to the instant case.

Further, we feel compelled to point out that the only possible way of distinguishing the instant situation from the **Van Horn** case would be the requirement of union membership after retirement or after discharge or quitting or abandonment of the mine. As was pointed out in the evidence, the United Mine Workers plan, the provisions of which are contained in many of the cases cited in the briefs, requires continued membership in the union after the retirement of an employee. However, we cannot see how anyone can distinguish between requiring union membership while the employee is digging coal and union membership on the date of retirement but not to support the same union to continue with his monthly payment after retirement. Such an assertion on the part of General Counsel we believe to be completely out of line with the facts and reason and law.

In the case of **John Penello vs. United Mine Workers,** 17 L.C. 65,591, 88 F. Supp. 935, the United Mine Workers were insisting upon the inclusion in the wage contract of a closed shop provision without complying with the statutory provisions that had previously been set up by Congress as a condition precedent to execution of a closed shop agreement. Also, the union insisted upon a welfare and retirement fund to be administered to limit the benefits thereunder to union members only. The Court said "As to the first practice, there is no doubt in the Court's mind that insistence by the respondents on inclusion in the wage contract of a closed shop provision without their compliance with the statutory provisions set up by the Congress as a condition precedent to execution of closed shop agreements, is an unfair labor practice under Sections 8(b)(2) and (3); and, further, the Court entertains no doubt but that the record in this case goes beyond the degree of proof required.

"As to the second practice, it is the opinion of the Court that insistence that the welfare and retirement fund be administered so as to limit the benefits thereunder to union members and their dependents without compliance with the statutory requirements for a closed shop agreement, is in conflict with Section 8(b)(2) and (3) of the Act. The record supports the probability of this unfair labor practice."

It is therefore apparent that the Court said that if the union shop provision had followed the statutes and was legal, it would then be all right for the union and the operators to bargain for a welfare fund to be administered for the benefit of union members only. These two propositions hinge entirely upon the validity of the union shop agreement. It is noted that in many cases the words "closed shop" and "union shop" are used interchangeably.

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We again repeat that in the instant case, the General Counsel admits that we have a legal union shop agreement and he does not question that whatsoever.

In the case of **Thomas vs. Kennedy**, 32 L.C. 70,667, Pennsylvania, Court of Common Pleas No. 1 November Term, 1953, 387 Pa. 636. Many of the provisions of the United Mine Workers plan of benefits are set forth, and, particularly, is set forth the requirement of continuing to be a member in good standing while drawing benefits from the retirement fund. In the **Kennedy** case, Thomas had not been employed in the industry for awhile but had kept up his membership in the union and had not complied with the requirement of the United Mine Workers as follows: "Retired members and disabled members receiving aid and those receiving state workmen's compensation payment, also members temporarily unemployed through no fault of their own, shall pay $1.00 per month dues to be forwarded to the local union, etc."

Another resolution of January 15, 1954 is set forth in the case requiring the retention of membership in the United Mine Workers of America during the receipt of pension payment.

The Court ruled that Thomas had complied as far as possible with the dues requirement, but through a misunderstanding and misinformation, the union had waived their right to object to the same and therefore ordered him placed on the pension roll subject to the rules established by the trustees for the administration of the fund (which included, of course, retention in the United Mine Workers of America.)

In the case of **James Terreo v. Roche**, decided by the United States District Court, District of Columbia, No. 388-55, 32 L.C. 70,634, the Plaintiff tried to collect the

UMW pension but under the eligibility requirements he had to be employed for a period of one year immediately preceding his retirement, and the court held that such was a valid requirement and he was denied a recovery.

In the case of **Neuffer v. Bakery and Confectionery Workers International Union**, U.S. Court of Appeals, District of Columbia, 16492, 307 Fed. 2nd 671, 45 L.C. 17,679, the Union who in that case was an employer, had a pension system and the Plaintiff had been denied benefits because he had engaged in dual unionism by sponsoring the creation of a rival union. He was denied benefits and the denial was sustained by the Court.

In the case of **Szuch v. John L. Lewis**, U.S. District Court, District of Columbia, 3243-59, 41 L.C. 16,695, 193 Fed. Supp. 831, which involved the pension system of UMW which is in reality similar to the pension system involved in the instant case, the Court denied a recovery to the Plaintiff and upheld the Trust Agreement which provided "Trustee shall have full authority, within the terms and provisions of the labor-management relations act. * * * * With respect to questions of coverage and eligibility * * * * National Bituminous Coal Wage Agreement of 1950."

The Court further said: "Trustees having the power to exercise discretion will not be interfered with so long as they are acting bona fides. To do so would be to substitute the discretion of the Court for that of the Trustees."

The Court went on to say: "The Trustees in this case have complete discretion to establish the eligibility requirements for a pension. They could, and have in fact, have changed these requirements. Upon Plaintiff's application for a pension they exercised their discretion to interpret the scope of one of these requirements. Their interpretation of the clause 'employed in the Bituminous

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Coal Industry,' was such that Plaintiff's status did not fall within the requirement. There is no evidence they acted in bad faith, arbitrarily or capriciously. The fact that the Court might interpret this term in a broader sense has no bearing since it is at the discretion of the Trustee that controls."

One of the most important portions of the foregoing case is found in the statement of the Court: "Present employees, who are potential beneficiaries, may have a present 'interest' such as to enforce compliance with statutory requirements for the administration of the fund, but the Coal Wage Agreement, did not contemplate vesting an employee with a present interest in the trust's res."

The foregoing case is on all fours with the instant case which involves the administration of a trust fund and a contract which specifically provides that the proposed beneficiary does not have any vested interest in and to the fund but that his interest is subject to the eligibility requirements.

As we said earlier, if there was any proof in the record from which an inference of coercion or restraint could be deduced, then we might have a different situation. But here for the Trial Examiner to find that there has been restraint and coercion is mere conjecture on his part. As was pointed out by the United States Supreme Court in the case of **NLRB v. Allis-Chalmers Manufacturing Company**, 388 U.S. 175, 55 L.C., 11972, the restraint and coercion of employees in the exercise of Section 7 deals with restraint and coercion by Unions in organizing campaigns.

We respectfully submit that it was never intended by Congress that either Sec. 8(b)(1)(A) or Sec. 7 which is referred to in Sec. 8(b)(1)(A) should apply to union membership and the benefits flowing therefrom under a valid

union shop agreement. This is even more true when applied to facts where employees give up job rights under a valid union shop agreement, as provided in Section 7. The charge here is a violation of Sec. 8(b)(1)(A) insofar as it relates to the rights guaranteed by Section 7. We submit that there is no proof whatsoever of restraint or coercion as provided in the Act, and that no violation has been proven.

We respectfully submit that the cases relied upon by the Circuit Court of Appeals, to-wit: NLRB v. International Union, United Auto Workers, Local 291, 194 F. 2d at 702; NLRB v. International Hod Carriers, 295 F. 2d 657 (C.A. 7, 1961); NLRB v. Die and Tool Makers, Lodge No. 113, 231 F. 2d 298, 301-302 (C.A. 7, 1956); NLRB v. Local 282, Teamsters, 412 F. 2d 334 (C.A. 2, 1969); and NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175 (1967) and Scofield v. NLRB, 394 U.S. 423, 429, n. 5 (1969), are not cases involving a valid union shop agreement and are not applicable to the instant case. We have seen these cases cited many time by Trial Examiners and by the Board but we cannot believe that this Court will be misled by these erroneous citations.

The Court below has interpreted a Federal statute in a way not in accord with applicable decisions of this Court. Section 8(b)(1)(A) of the Act, guarantees to the Union the right to prescribe its own rules for membership. The Court below, while recognizing that the Union's Security Agreement was valid, nevertheless held that the result of the Agreement as applied to the Union's Welfare and Pension Plan restrained employees job benefits and coerced employees in the exercise of their Section 7 rights and was therefore, not a valid justification for the Union's action.

Section 8(b)(1)(A) of the Act states:

(b) It shall be an unfair labor practice for a labor organization or its agents.

(1) To restrain or coerce

(a) Employees in the exercise of rights guaranteed in Section 7: Provided that this paragraph shall not impair the right of the labor organization to prescribe its own rules with respect to acquisition or retention.

The Court below held that Section 8(b)(1)(A) was violated because Petitioner coerced employees in the exercise of their Section 7 rights to join or not to join a labor union since welfare and pensions benefits were denied to employees who did not remain members of the PMW. However, the Court does not say that the Union Security Agreement entered into between the employer and the Union was illegal; and indeed that is so because in Section 7 of the Act, the right to refrain from joining a Union can be limited by such an agreement. The Court speaks in terms of job rights and job benefits being denied to employees, but yet this agreement affects the very basic fundamental right of employees, namely the right to the job itself, since to remain on the job after thirty (30) days, he must become a member of the Union. Therefore, if he wishes to work more than thirty (30) days this right is denied him and legally so under the proviso of Section 7.

We submit therefore, that an incidental benefit of his job, namely, his right to certain pension benefits are not violated when the very proviso allowed by Section 7 is carried over as an eligibility factor under the Welfare and Retirement Pension Plan. The Board and the Court below have at least impliedly conceded that the Union had the right to deny membership to an employee by changing mines and changing unions, and it further stated that this is not an unfair labor practice, at least on the facts before

this Court. The Court below has also conceded the validity of the Union's argument that the membership eligibility factor in order to receive benefits does have validity in order to forestall the possibility of double pension coverage for an employee which is certainly intended to be avoided under Union pension plans in the coal industry.

It is clear from Section 7 that the right of an employee to join or not join a Union is restricted by the validity of the Union's Security Agreement. If that be true, then we fail to see the logic in the Court's reasoning that an incidental job benefit may not also be affected, as long as it is not unreasonable, by the same requirements of the Union Security Agreement incorporated into a Pension and Welfare Plan as an eligibility factor. What the Court below has done, as a result of its holding, is to vest in the employee immediately, rights in and to money accrued under the Welfare and Retirement Plan, which is contrary to the very terms of the Plan itself.

If, in other words, the eligibility requirement of membership in order to receive benefits does not coerce or restrain the employee in the exercise of their Section 7 rights to any greater degree, and indeed a much lesser degree, than requiring Union membership in order to continue employment itself as is allowable under Section 7.

It should be noted that the benefits being discussed here are true to the employees under a non-contributory plan funded entirely from contributions by the employer. The employee puts in absolutely nothing. The trust is administered under a Trust Agreement entered into between the employer and the Union and is handled entirely administratively through the Union and its agents.

The Court below has conceded that the Union, under the proviso of Section 8(b)(1)(A), has the right to prescribe

its own rules with respect to acquisition or retention of membership therein. In other words, within reason, the regulation of Union affairs internally is up to the Union. The Welfare and Retirement Plan is one of the matters required to be regulated by the Union as a matter of its own internal concern. Therefore, we would submit that barring any arbitrary or capricious action on the part of the officers and agents of the Union, the regulation and administration of the fund is within the preview of the Union. In this connection, the requirement of membership in order to maintain eligibility is certainly not arbitrary nor capricious since it is that very membership which enables the Union to survive. And, it is that very membership which confers upon the employees the benefits of the Plan now under discussion.

V. If the Decision is allowed to stand it will cast a burden upon interstate commerce which is contrary to the very fundamental purposes of the Act itself.

A. The contract of employment.

The coal industry is unique in its operation and certain facts should be taken into consideration in relation to the overall picture.

On one hand we have the United Mine Workers who operate under a master contract with the Illinois Coal Operators Association, which in turn is affiliated with the national group of operators and there is a master contract between the National Bituminous group and that master contract is then incorporated by the Illinois Coal Operators Association.

They operate on a national basis and have a welfare and retirement fund on a national basis which is operated under the common pot theory and pay benefits to United

Mine Worker union members who retire from mines operated under said agreements.

For many years the Progressive Mine Workers have had a master contract with the Coal Producers Association of Illinois, who represent an association of coal operators in the state of Illinois. There are other operators who do not belong to the association but who adopt the master contract by reference and then have tailor made contracts for their individual mine, such as Peabody or Midwest.

Unlike many industries where there are several unions representing employees in a factory, in a coal mine all employees around the coal mine belong to the Union except for supervisory personnel. For example, the contract between the Coal Producers Association of Illinois and Progressive Mine Workers of America, District No. 1 (adopted by reference in GC Exhibit 5 and made a part thereof) provides:

> "The party of the second part (PMW) is recognized as the exclusive representative of all the employees of the Operators for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment, except the employees in those exempted classifications of employment as hereinafter set forth in this contract. As a condition of employment all employees covered by this contract shall be, or shall become, members of the Progressive Mine Workers of America, District No. 1, to the extent and in the manner permitted by law."

The exempted persons under the contract are found on page 14, consisting of the mine manager, mine manager's assistant, top foreman, company weightman, boss drivers, night boss, head machinist, head boilermaker, head carpenter, head electrician, and watchman.

There is no dispute in the instant case, as a matter of fact it has been stipulated, that the union shop agreement in effect at the instant mine is a valid union shop agreement.

The welfare and retirement fund was created on June 12, 1946 and it specifically stated that it was created for the purpose of providing a welfare and retirement fund for the union employees of the association members. In fact the trust agreement which governs the welfare and retirement fund specified that it was for the union members of the operators signatory thereto.

This trust agreement and the trust it created have stood the test of time for almost twenty-two years, being operated under the principles established in those documents.

Since its inception all of the documents creating the trust, together with a plan of benefits, have contained the provision that no beneficiary shall have any vested right in said fund.

In other words, the entire coal industry in the United States has created by contract two separate trusts, one by the UMW and one by the PMW, by which members of the union affiliated with each organization participate. However, their rights are not vested rights but are determined solely in accordance with the documents creating the trust.

In order to sustain the report of the Trial Examiner and the decision of the Board the Court will have to upset the procedure of handling these trusts for the past twenty-two years, and now say that during all of that time they have been operated upon an illegal basis. In other words, to sustain such a finding will throw the operation of these trusts into such a turmoil as to make it almost impossible to continue to administer retirement pension

plans for which every effort has been made to make them actuarially sound.

B. The Midwest Pension Plan.

The Welfare and Retirement Plan at the Midwest Mine which is involved in the instant case, varies in many respects from the master plan which has been adopted at other mines and which is tailor-made for this particular mine.

It will be noted that while this mine was being operated originally under a contract with PMW it had accumulated, under the common-pot theory, retirement pension monies of $247,000.00. This mine was involved in an unfair labor practice matter whereby the men were compelled to join the United Mine Workers by the operator and after years of litigation an election was ordered and the membership voted to join the PMW. Thereafter, the Welfare and Retirement Fund was renegotiated and this $247,000.00 was then placed in allocated accounts to the member-employees who were then employed and members of the union, based upon length of service, age, etc. Thereafter, annually, monies are allocated to this account based upon these actuarial formulas. However, the plan still contains the provision that no beneficiary has any vested interest in and to any of the monies but that an employee to receive any monies must be eligible in accordance with the plan of benefits.

There is no question but what it is difficult to fund a pension system at a coal mine where the money is not available at the time the plan is put into effect, but must depend upon the life expectancy of the mine in order to fund the pension. This means that if the life expectancy is not too great then older men retiring may receive a disproportionate share of the money compared to the

younger men when they reach retirement age. Or if the mine is abandoned then some equitable method has to be used in order to fund pensions for those who are eligible and yet protect the rights of men who have not quite reached the retirement age, but who cannot find employment in other mines.

To accomplish these purposes at the Midwest Mine an actuarial formula was adopted to distribute the monies (Exhibit Vol. P. 7-31) in the beginning, and this table was used thereafter in order to place more money at the disposal of older men than the younger men until such time as the older men could become fully funded and therefore receive a full pension upon reaching retirement age and meeting all of the eligibility requirements.

The plan provides that a payment of fifteen per cent will be made to the reserve account which is used for welfare purposes by the entire plan of the PMW District No. 1, and thereafter administrative costs are deducted and then payments are made into the death and dismemberment fund and medical care fund based upon number of employees times the dollars per month needed to fund such benefits, all of which are carried on a common pot basis. However, the balance of the funds are then, by bookkeeping entry, allocated to the Midwest Mine and once a year reallocated by a bookkeeping method, to individual employees in order to try and keep the younger ment and older men on an even keel in the event the mine should be worked out or abandoned prior to the funding of all pensions.

In the event a man quits or is discharged so long as he is not employed in the industry he can draw an accelerated retirement pension to help him find other employment. However, in the event he has more money allocated to

him than would give him five per cent for each year of work in the coal industry that money is deducted and placed in the contingency reserve account. If he should draw out certain monies by way of retirement and later return to the coal industry at another mine, then any balance would be transferred to his account at the other mine and used to fund his pension there so that there would not be a duplication of funding. Likewise, he would be penalized for any amount of monies withdrawn during that period of unemployment which would not again be funded and made available to him at the other mine.

The plan is based upon a certain turnover as testified by Actuary Moss who stated that in reaching the actuarial computations he took into account the number of men who would quit and would not be eligible for retirement pension and the number of men who would die without dependents and all of their money would then go into the contingency reserve account to help fund the pensions of other employees.

The plan specifically provides that when pensions have been funded for all employees then the contributions to the fund by Peabody are reduced. This point has not as yet been reached.

Even a member of the PMWA could not quit the Midwest Mine and go to work at another mine and draw his pension but the Trial Examiner found that Bosse and Ude should be entitled to immediate benefits even though they are working in the coal industry contrary to the provisions of the plan.

A member of the PMWA who would go to another PMW mine could not have more than one pension funded and when that was funded he would be done. However, the Trial Examiner and the Board wants Peabody to fund

a pension at Midwest and then turn around and make contributions to another mine under UMW and allow the employee to draw two pensions upon reaching retirement age.

The Peabody Allocation Plan for Midwest Mine is found in Vol. II Exhibits PP. 7-31 and we feel that it is important that it be considered on its own merits as tailor-made to fit the employees at this mine. We feel that it is intended only for employees of the mine who reach retirement age or who become disabled or who may quit and go outside the coal industry, but it is not tailor-made to fit a situation where a man could fund a pension at Midwest and then go to another mine and have a duplication of another pension funded so that upon reaching retirement age he would draw two pensions.

The UMW plan which is now applicable to Bosse and Ude under their new employment at Eagle Mine and contributed to by Peabody provides for the same amount of pension upon reaching retirement age as the pension system they left at Midwest. The real difference between the two plans is in the fact that the UMW is operated under the common pot theory whereas the Midwest Plan is operated under an allocation theory so as to stop one member from getting more than his share upon retirement in the event the full pension is not funded eventually.

As the record is undisputed, and discloses if a man quits under the UMW plan before reaching age 55, he is not eligible and gets nothing. He must have a work record in the coal industry and have at least one full year at the mine from which he retired upon reaching retirement age.

The Midwest Plan is an integrated plan and if a man is eligible for one thing he is eligible for the others. He is eligible for death and dismemberment and for medical

care in addition to the pension. They are inseparable. Yet the Trial Examiner would try to say that a man should be entitled to retirement moneys but how can he separate the other benefits from retirement benefits?

All pension systems when they are put into effect have to take into consideration prior service credit for a man in the industry. This was done at Midwest by allowing a heavier credit for older men based upon length of service in the inception of the plan. Under the UMW plan this is a part of the common pot theory and is not done by bookkeeping methods.

In other words at Midwest a man who is 50 years of age on the date of inception of the plan had his prior service credit funded and eventually upon retirement will receive the same amount for his years of service in the industry as though he were a new employee and worked the full time. This same thing is true under the UMW plan because they give him credit for his years of service in the industry whether under UMW or PMW or wherever worked provided he works his last year at the UMW mine and retires at age 55 or over from that UMW mine which was contributing to their fund. By the same token a man could have worked under the UMW plan for 20 years and then come to a PMW plan and his prior service credit in the industry is funded so that upon reaching retirement age of 55 or over he is funded for $115.00 pension per month at the present time.

Neither of these plans have any vested interest on the part of the beneficiaries but are subject to change at any time based upon the conditions then existing and the amount of money available for the funding of pensions.

The big confusion which has been caused in the mind of the Trial Examiner and others who have not carefully

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considered the facts and the law applicable to the instant case is by the bookkeeping entry called "allocation". Because each year a sheet is made up showing the amount of money allocated for the pension for each individual, they assume that that individual has a vested interest in and to that fund as shown on that sheet. This is clearly erroneous because all of the documents state that there is no vested interest in the fund. As was clearly explained by Actuary Moss this bookkeeping method is a little more expensive than the common pot theory but it does help to equalize retirement payments in the event of the abandonment of the mine prior to the time all pensions are funded so that all beneficiaries can be treated equitably.

The total amount needed to fund all of these pensions is staggering whether under the UMW system or under the PMW system. However, we are achieving our goal and we feel that we are complying with Section 302 of the Act which said Section has been construed to mean that pensions and annuities shall be on an actuarially sound basis.

To try and achieve this actuarially sound basis the money is allocated on an actuarial basis even though payments may not be actuarially paid. However, once a member employee has drawn his allocated accounts he is out of business except for possible future allocations and money made available by way of forfeitures and death without dependents and other causes. It is the latter assumption that helps to make the plan actuarially sound because it is inconceivable and incomprehensible that an employer should be required to fund an actuarially sound pension for all employees who may quit before they become eligible and other normal turnover procedures.

The Midwest Plan has recently been amended to say

that an employee cannot quit or be discharged, or in the event of abandonment and draw any pension moneys unless he has at least a three year work record at the mine. This of course would not be applicable to Bosse and Ude because they both have more than that period of time at the mine.

We have tried to explain these systems because we want the Court to have all of the details in considering the Trial Examiner's recommendations and the Board's decision. However, we believe that it is important to keep in mind that it was never intended that the coal industry should be required to fund two pensions for an individual member-employee by allowing him prior service credit and then allowing him to jump from one job to the other in order to qualify for two separate pensions.

Being specific in this regard, let's assume for a moment, although we deny it, that Bosse and Ude would be entitled to draw the moneys that are allocated in their pension account at Midwest Mine. There is no question under the facts in the instant case that upon reaching age 55 if they had a twenty year work record in the coal industry and have spent one year at their place of employment with the UMW mine they will be entitled to draw $115.00 monthly pension.

The Act was specifically adopted to stop industrial strife or unrest which have the intent or the necessary effect of burdening or obstructing commerce. Obviously, the funding of two pensions as would result in the instant case, would be a burden upon interstate commerce which was never intended. Of course, General Counsel argues that he didn't mean that there should be two pensions, but he wants us to hold the money so that if these men don't qualify for a UMWA pension they then could fall back

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upon us and draw their pension. Or, if the UMWA plan went broke they could draw from us. Or, if we should increase our pension to more than the UMWA pay they should have the benefit of the difference, and we should pay them only the difference. Of course, this would require a lot of amendments to our plan. WE JUST DON'T BELIEVE THAT THE BOARD HAS THE POWER TO RE-WRITE OUR PLAN OF BENEFITS.

If these men wanted to voluntarily quit, they had that privilege, but they also have to take the gamble which goes along with it, that if they don't like the place they went to, they are stuck and out of luck. That is the way life operates. That would be like dropping one insurance policy and taking another, only to find the company bankrupt, and then asking to be reinstated to the first. We don't think this Section of the Act was designed to cover such a situation.

Secondly, it stands to reason that great unrest will come about in the industry because of this decision, if it is allowed to stand. If every PMWA employee believes that he can quit his job and go to work in a UMWA mine he will draw two pensions upon reaching retirement age, all of them will quit and try to obtain employment at a UMWA mine. This is human nature.

We ask the Court to take Judicial Notice of what has happened in these matters by the actions of the Labor Board. The allocation system under Plan No. 7 was first adopted by the Co-Trustees and put into effect March 4, 1958, (Vol. II Exhibits, PP. 64-67). The Peabody Plan at Midwest was adopted Jan. 17, 1962 (Vol. II Exhibits PP. 7-31). Nobody ever complained about the union membership requirement or forfeiture of allocations until November 9, 1965, when Dorman Glass filed charges on behalf

of 8 employees, which resulted in a Trial Examiner's decision July 6, 1966, (which was reversed by the Board without any publicity.) After that decision was made public, other charges were filed January 9, 1967. The Board dismissed the complaint in the Dorman Glass case June 15, 1967. (165 NLRB No. 31) However, Bosse and Ude quit their jobs and filed charges August 1, 1967. (The instant case.) March 18, 1968, 12 employees who had quit their jobs at Sahara Coal Co. filed charges (Case No. 14 CB1656) and April 16, 1968, 4 more employees filed (Case 14 CA4645). All of these employees were covered under the UMWA Pension Plan, and are trying to collect under both plans. On December 27, 1968, William Davis filed another charge (Cases 14-CA 4943 and 14-CB 1778) for himself and 15 other employees who had quit their jobs at Sahara Coal Company, and taken up employment at UMWA mines, claiming pension rights under both systems. There can be no other argument, but what if this continues there will continue to be large numbers of employees who will be job jumping in order to qualify for two pensions upon retirement. We don't believe the Act was ever intended for this purpose, and we believe that Interstate Commerce will definitely be obstructed and burdened by the action of the Board.

CONCLUSION

It is obvious that the charging parties have not been deprived of anything whatsoever, but only a possible theoretical deprivation in the future if they should not qualify for a UMWA pension at the mine where they are now employed. This is the same as saying that an employee should be protected where he quits his job and gambles on a different life and health and accident insurance plan under a different employer. Both have certain built-in guarantees, but he alone has the choice to make such a gamble as provided in the instant case.

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The instant case is extremely important to trustees who must do everything within their power to avoid personal liability, while at the same time trying to achieve an actuarially funded pension.

We earnestly request that this Court grant this Petition in order to lay down guidelines, in a case of first impression, for such Co-Trustees in the administration of their duties.

Respectfully submitted,

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Springfield, Illinois
Attorneys for Respondent

APPENDIX A

TRIAL EXAMINER'S DECISION

Statement of the Case

MARION C. LADWIG, Trial Examiner: This case was tried at St. Louis, Missouri, on March 11-12, 1968, pursuant to a charge filed on August 1, 1967,[1] by Melvin J. Bosse, an employee of Peabody Coal Company, herein called the Company, against the Respondent, Local Union No. 167, Progressive Mine Workers of America,[2] herein called the Union, and pursuant to a complaint issued February 8, 1968. The case is a sequel to an earlier case in which the Board approved the charging of a union service fee (in the form of reduced union dues) as a requirement for employees, who no longer work in the bargaining unit, to maintain their eligibility status under the retirement plan. In the present case the Union, enforcing its rule against dual unionism, refused to continue accepting union dues from two employees after the Company permitted them to transfer from a mine within the bargaining unit to a mine where the employees were represented by a rival union. The primary issue is whether the Union's refusal to accept the service fee, subjecting to forfeiture over $11,000 in pension funds allocated to the two employees, violated Section 8(b)(1)(A) of the National Labor Relations Act, as amended.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Union, I make the following:

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[1] All dates, unless otherwise indicated, refer to the year 1967.
[2] The name of the Union was amended at the trial.

Findings of Fact

I. The Business of the Company and the Labor Organization Involved

The Company, an Illinois corporation, is engaged in the mining, processing, selling, and distributing of coal in several States including Illinois, from which it annually ships coal valued in excess of $50,000 directly to points located outside the State. The Union admits, and I find, that the Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that the Union is a labor organization within the meaning of the Act.

II. The Alleged Unfair Labor Practices

A. The Earlier Proceeding

In the earlier case, the Respondents were the Coal Producers' Association of Illinois, herein called the Association, and the Progressive Mine Workers of America, District No. 1, herein called the PMW and the District. The Association and the District are parties to a collective-bargaining agreement covering a multiemployer unit, and are bargaining representatives for the Company and the Union.

The Board in its decision, **Coal Producers' Association of Illinois**, 165 NLRB No. 31 (1967), sustained the union contention that the reduced dues "required to maintain union membership during periods which an employee is not working at a mine within the bargaining unit are actually in the nature of a service fee" for the union services rendered in furtherance of the association-wide retirement plan. Noting that the collective-bargaining agreement lawfully requires union membership as a condition of employment in the bargaining unit, the Board concluded that "the Union is entitled to charge a fee" (which is "reasonably related to

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the value of the services rendered by the union") "to employees who no longer work in the unit who desire to participate in the plan's benefits." In so ruling, and dismissing the complaint, the Board however stated:

> . . . we wish to emphasize that we do not reach the further question whether employees are in fact required, pursuant to the plan, to maintain their membership in the Union [in addition to paying the service fee], or may have their membership forfeited in a manner that would be violative of Section 8(a)(3) of the Act.

The Board was referring to the allegations in the complaint that the retirement plan itself requires membership in the PMW as a condition of eligibility for benefits and, **inter alia**, that there had been a "prospective forfeiture of funds already allocated from wages for the purposes of future benefits in the case of three . . . employees who voluntarily quit mines which were covered by the plan and immediately commenced working at mines represented by the United Mine Workers of America (UMW)" and that these employees were "subjected to forfeiture of fund allocations because they were not members of PMW." In explanation, the Board stated:

> . . . our reason for not reaching it is that — apart from references in the plan itself which tend to suggest the possibility that such discrimination may occur — the record furnishes no adequate proof to establish that the eligibility status of individuals covered by the plan has been forfeited for any reason other than failure to make periodic payments to the Union. At the hearing the parties stipulated that the . . . alleged discriminatees **made no attempt to keep up their union dues** after ceasing to work at mines represented by the Union . . . (Emphasis supplied.)

In the present case, in which the Union admittedly rejected the union dues, as discussed below, the question not reached in the earlier decision must be resolved.

B. Service Fee Rejected

Until January 16, Melvin J. Bosse and Marvin Ude were employed at the Company's Midwest Mine — a PMW mine where the employees were covered by the PMW retirement plan (as modified by contracts between the Company and the District). Under this plan, Bosse had a balance in his "individual Retirement-Pension Allocation" of $8,154.95 (as of November 1, 1966), and Ude had a balance of $3,-164.47 (as of November 1, 1965). Under the terms of the plan, they could transfer to another PMW mine, or even leave the coal industry, and still retain the fund allocations — provided that they "continuously remain members in good standing of a local Union of the Progressive Mine Workers of America, District 1 . . . . Dropping of such membership shall automatically forfeit any fund then allocated . . ." (Bosse, age 48, had worked at the Midwest Mine since 1939 — over 27 years; and Ude had worked there over 10 years, since 1956.)

On January 16, before quitting their jobs at the Midwest Mine and being transferred by the Company to a UMW mine the following day, both Bosse and Ude paid union dues for the remainder of the year to the Union's financial secretary, Harry E. Taylor. Each of them was given a receipt for $15.95, for the 11 months, February through December (at $1.45 a month), the amount charged members working outside the mining industry).

On March 15, the Union mailed Bosse and Ude each its check for $15.95, with a note reading: "I am returning the moneys you presented to Fin. Sect. Taylor for Cash Dues as it is in violation of Dist. Constitution" — referring to Article 6, Section 5, which reads in part:

> . . . any member of the P.M.W. of A. accepting employment in the coal industry in any mine not under

> contract with the [Progressive Mine Workers, shall] be immediately dropped from membership.

In January 1968, Bosse and Ude mailed to the Union their checks for 1968 dues. The Union returned the checks with letters stating that their membership in the Union had been dropped as of March 1967 for violation of the Constitutional provision prohibiting dual unionism. In its brief, the Union admits that it is required by the Constitution to suspend the membership of persons who become members of the UMW and go to work in a UMW mine.

Unless the Union's action in rejecting the dues is rescinded, Bosse's and Ude's allocated pension funds — totaling over $11,000 — will be forfeited, depriving them and their survivors of all PMW retirement benefits, and depriving Bosse of an immediate $115 monthly "installment payout" of all his $8,154.95 allocated funds (and Ude, of one-half his allocated funds) in the event they quit the mines and worked outside the coal industry.

C. Concluding Findings

In the preceding case, discussed heretofore, the Board found that there was "no adequate proof to establish that the eligibility status of individuals covered by the [PMW retirement] plan has been forfeited for any reason other than failure to make periodic payments to the Union." Here the Union admits that it has rejected such periodic payments (found by the Board to constitute a service fee), thereby subjecting Bosse's and Ude's allocated pension funds to forfeiture under the provisions of the retirement plan.

In the earlier case, the union contention was that the "dues required to maintain union membership during periods which an employee is not working [at a PMW mine] are actually in the nature of a service fee." Here, ignoring

the earlier argument that only a union service fee was being required, the Union contends that under the Section 8(b)(1)(A) proviso, reserving to it the right to "prescribe its own rules with respect to the . . . retention of membership" in the Union, it had the right to terminate the membership of the two employees when they joined the UMW and worked in a UMW mine.

In view of the prior ruling of the Board, it is clear that—apart from requiring the payment of a reasonable service fee—a union cannot lawfully require employees who no longer work in the bargaining unit to maintain their union membership as a condition for participating in the benefits of a retirement plan. I therefore find that the Union's refusal to accept the service fee from Bosse and Ude, because of their membership in the UMW and their employment at a UMW mine, thereby subjecting their allocated pension funds to forfeiture under the provisions of the retirement plan, coerced the two employees in the exercise of their Section 7 rights, in violation of Section 8(b)(1)(A) of the Act. Also, as contended by the General Counsel, I find that the Union's "refusal to permit these employees to remain eligible for . . . retirement pension benefits constitutes a threat to all employees still working at the Midwest Mine that if the PMW finds them ineligible for membership it can refuse to accept dues from them and thereby cause them to lose their deferred wages held in the Welfare and Retirement Pension Fund. Such a threat restrains and coerces employees in violation of Section 8(b)(1)(A) of the Act." **Local 479, Amalgamated Clothing Workers (Jaymar Ruby, Inc.)**, 151 NLRB 555, 558 (1965).

Inasmuch as the charge herein was filed within 6 months after the Union violated the Act by rejecting the union dues (or service fee), I find no merit to the Union's contention that the charge was not timely filed.

In finding that the Union violated the Act by rejecting the service fee, I do not deem it necessary to rule on such further contentions in the briefs as (a) the General Counsel's argument that "Respondent admits that an employee who leaves the coal industry may immediately draw benefits from his allocated funds, even while he is working. Obviously, this would be true even though the employee may have a pension plan covering his new employment. Hence, it is clear that Respondent's reason for not permitting Bosse and Ude to remain eligible for benefits is not because they may be covered by two pension plans but rather because they have become members of a rival labor organization"; or (b) the Union's argument, "We do not believe that it was ever intended that employees could jump from one job to another and accumulate pension and require industry to fund more than one pension . . . . If that is to be the law, then it can only come about by the administrative action of the Board which we believe is contrary to the law . . . . We do not believe that it was ever intended that the Board could order details of plans amended and make suggestions on how plans should be funded and run, unless it is being operated in violation of the Act." My rulings are confined to the limited issues before me.

Conclusions of Law

1. By refusing to accept from Melvin J. Bosse and Marvin Ude the service fee required for continued participation in the retirement plan's benefits, the Union has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

2. By threatening employees at the Midwest Mine with the loss of deferred wages held for them in the retirement fund in the event the Union finds them ineligible for mem-

bership, the Union restrained and coerced the employees in violation of Section 8(b)(1)(A) of the Act.

The Remedy

Having found that the Respondent has committed certain unfair labor practices, I shall recommend that it be ordered to cease and desist from such conduct, and to take affirmative action, which I find necessary to remedy and to remove the effect of the unfair labor practices and to effectuate the policies of the Act.

The Respondent having unlawfully refused to accept the service fee tendered by Melvin J. Bosse and Marvin Ude, thereby subjecting to forfeiture over $11,000 in pension funds allocated to them, I shall recommend that the Respondent be ordered **inter alia:** (a) to accept, if again tendered by Bosse and Ude, the rejected service fee for the period from February 1967 through December 1968; (b) thereafter to accept any such service fee from Bosse and Ude if timely tendered by them; (c) to notify the trustees of the retirement plan that insofar as the requirements of union membership in the plan are concerned, Bosse and Ude have, at all times since January 16, 1967, remained members in good standing in the Respondent Local; and, in the event that Bosse's and Ude's eligibility status under the retirement plan is not continued or restored, (d) to provide a guarantee (in the form of an appropriate bond or insurance policy) that any benefits lost as a result thereof are timely paid.

Accordingly, on the basis of the foregoing findings and conclusions, and on the entire record, I recommend pursuant to Section 10(c) of the Act, issuance of the following:

ORDER

Respondent, Local Union No. 167, Progressive Mine

Workers of America, its officers, agents, representatives, and successors, shall:

1. Cease and desist from:

(a) Refusing to accept the union dues of Melvin J. Bosse and Marvin Ude as a service fee for continued participation in the PMW Welfare and Retirement Pension Plan.

(b) Threatening employees of Peabody Coal Company at the Midwest Mine with the loss of deferred wages held for them in the retirement fund in the event the Union finds them ineligible for membership.

(c) In any like or related manner restraining or coercing employees of Peabody Coal Company at the Midwest Mine in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Accept the service fee, if tendered by Melvin J. Bosse and Marvin Ude, as provided in the section of the Trial Examiner's Decision entitled "The Remedy."

(b) Notify the trustees of the retirement plan that Bosse and Ude have continuously remained union members in good standing, as provided in the section of the Trial Examiner's Decision entitled "The Remedy."

(c) In the event Bosse's and Ude's eligibility status under the retirement plan is not continued or restored, provided the guarantee, in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy," that any benefits lost as a result thereof are timely paid.

(d) Post, in conspicuous places in Respondent's office, meeting hall, and places where notices to its members are customarily posted, copies of the attached notice marked

"Appendix."[3] Copies of such notice on forms provided by the Regional Director for Region 14, after being duly signed by an authorized representative of the Respondent, shall be posted immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Upon request of the Regional Director, the Respondent shall supply him with a sufficient number of signed copies for posting by Peabody Coal Company at its Midwest Mine, if the Company desires to do so.

(e) Notify the Regional Director of Region 14, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.[4]

Dated at Washington, D.C. Apr. 24, 1968.

/s/ Marion C. Ladwig
Trial Examiner

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[3] If this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

[4] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 14, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

NOTICE

To All Members of Local Union No. 167,
Progressive Mine Workers of America

PURSUANT TO
The Recommended Order of A Trial Examiner of the
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT
(As Amended)

we hereby notify you that:

WE WILL NOT refuse, because of membership in the UMW, to accept dues as a service fee for continued participation in the PMW Welfare and Retirement Pension Plan.

WE WILL NOTIFY the trustees of the PMW retirement plan that Melvin J. Bosse and Marvin Ude remain union members in good standing to the extent required for receiving benefits under the plan.

WE WILL GUARANTEE to Bosse and Ude that if their eligibility under the PMW retirement plan is not restored, any benefits lost as a result will be paid at union expense.

LOCAL UNION NO. 167,
PROGRESSIVE MINE WORKERS
OF AMERICA
(Peabody Coal Company)

.....
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive

days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 1040 Boatmen's Bank Building, 314 North Broadway, St. Louis, Missouri 63102, Tel. (314) 622-4154.

APPENDIX B

DECISION OF NATIONAL LABOR RELATIONS BOARD

DECISION AND ORDER

On April 24, 1968, Trial Examiner Marion C. Ladwig issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the said Decision and a brief in support, in addition to a request for oral argument; the General Counsel filed a brief in response to the Respondent's exceptions and brief.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner except as modified herein with respect to remedy.[1]

---

[1] The Respondent's request for oral argument is denied as, in our opinion, the record and the briefs adequately present the positions of the parties.

The Respondent contends that the charge herein was untimely within the meaning of Section 10(b) because filed on August 1, 1967, more than 6 months after the January automatic loss of PMW membership by employees Ude and Bosse. The question of when loss of PMW membership actually occurred is not in issue; the rejection of payments in the nature of a service fee is. This rejection occurred on March 15, 1967, within the 6 month statutory period prescribed in Section 10(b) of the Act, hence the motion to dismiss is denied.

As found by the Trial Examiner, it is clear from the record that the effect of the Constitution and By-Laws of District No. 1, Progressive Mine Workers of America, as amended in April 1966, is to prohibit dual

unionism when employees go to work at a mine where the United Mine Workers is the bargaining representative, although the clause itself is worded in terms of being dropped from membership "upon accepting employment in the coal industry in any mine not under contract" with the Progressive Mine Workers. Said Constitutional provision, however, does not prohibit the continued payment of service fees as a means of maintaining eligibility under the Welfare and Retirement Pension Plan. Within the meaning of our decision in **Coal Producers' Association of Illinois**, 165 NLRB No. 31, and of our decision here, the violations we find and here remedy are based upon the rejection of said service fees and resulting deprivation of rights under the Plan — not the denial of PMW membership as such. We are not here dealing with acquisition or retention of membership in the sense protected by the proviso to Section 8(b)(1)(A), and our decision is not intended to require the Respondent to confer membership status on Bosse and Ude.

THE REMEDY

The Trial Examiner, in addition to recommending that the Respondent cease and desist from refusing to accept the union dues of Bosse and Ude as a service fee for continued participation in the PMW Welfare and Retirement Pension Plan, and recommending that it accept such service fees if tendered, also included provision for a guarantee in the event Bosse's and Ude's eligibility status under the Plan is not continued or restored by the Respondent. He recommended an appropriate bond or insurance policy for timely payment of any benefits lost by Bosse and Ude. This portion of the remedy was not sought by the General Counsel. We view this facet of the recommended remedy as appropriately one for the compliance stage of proceedings, should such action become necessary. In all the circumstances, including the special problems inherent in adjusting individual rights under plans of this sort, we shall not assume noncompliance at this stage of the proceeding. Accordingly, our Order here, which is otherwise essentially that of the Trial Examiner, excludes provision for a guarantee in the event of noncompliance.

ORDER

Pursuant to Section 10(c) of the National Labor Re-

lations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Local Union No. 167, Progressive Mine Workers of America, Millstadt, Illinois, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Refusing to accept the union dues of Melvin J. Bosse and Marvin Ude as a service fee for continued participation in the PMW Welfare and Retirement Pension Plan because said individuals left the Midwest Mine of Peabody Coal Company to work at a mine where the employees are represented by the United Mine Workers.

(b) Threatening employees of Peabody Coal Company at the Midwest Mine with the loss of allocations held for them incident to the said Plan in the event they leave Midwest Mine to work at a mine represented by the United Mine Workers.

(c) In any like or related manner restraining or coercing employees of Peabody Coal Company at the Midwest Mine in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Accept the rejected dues of Melvin J. Bosse and Marvin Ude, for 1967 and 1968[2] as service fees if again tendered, and notify the trustees of the Plan that Bosse and Ude have been eligible continuously for benefits under the Plan, and shall remain eligible so long as they make the periodic service fee payments uniformly required.

(b) Post in conspicuous places in the Respondent's office, meeting hall, and places where notices to its mem-

[2] The period covered is the last 11 months of 1967 and all of 1968.

bers are customarily posted, copies of the attached Notice marked "Appendix."[3] Copies of such Notice on forms provided by the Regional Director for Region 14, after being duly signed by an authorized representative of the Respondent, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that the Notices are not altered, defaced, or covered by any other material. Upon request of the Regional Director, the Respondent shall supply him with a sufficient number of signed copies for posting by Peabody Coal Company at its Midwest Mine, if the Company desires to do so.

(c) Notify the Regional Director of Region 14, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C., Dec. 11, 1968.

Frank W. McCulloch, Chairman

John H. Fanning, Member

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

Sam Zagoria, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[3] In the event the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

NOTICE TO ALL MEMBERS

PURSUANT TO
A Decision And Order Of The
NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT
(As Amended)

we hearby notify our members that:

WE WILL NOT refuse, because a member-employee accepts work in the coal industry at a mine under contract with the United Mine Workers, to accept dues from such individual as a service fee for continued participation in the Progressive Mine Workers Welfare and Retirement Pension Plan.

WE WILL accept the rejected dues of Melvin J. Bosse and Marvin Ude for 1967 and 1968 as service fees if again tendered, and notify the trustees of the PMW Plan that Bosse and Ude have been eligible continuously for benefits under the Plan, and shall remain eligible so long as they make the periodic service fee payments uniformly required.

LOCAL UNION NO. 167,
PROGRESSIVE MINE WORKERS
OF AMERICA

.....
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive

days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 1040 Boatmen's Bank Building, 314 North Broadway, St. Louis, Missouri 63102, Tel. (314) 622-4154.

(Here follows Trial Examiner's Decision together with copy of notices previously printed in this Appendix, and not here reproduced)

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1969 — JANUARY SESSION, 1970

No. 17372

LOCAL UNION NO. 167, PROGRESSIVE MINE [redacted] OF AMERICA, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*,

Appeal from a Decision and Order of the National Labor Relations Board.

FEBRUARY 6, 1970

Before HASTINGS, *Senior Circuit Judge*, and KILEY and KERNER, *Circuit Judges*.

KERNER, *Circuit Judge*. This case is before the court upon a petition to review and set aside an order of the National Labor Relations Board (Board issued against petitioner Local Union No. 167, Progressive Mine Workers of America (Union) remedying a violation of §8(b)(1)(A) of the National Labor Relations Act (Act). In its cross-application for enforcement, the Board requests the order be enforced in full. We conclude that the Board's order should be enforced.

Progressive Mine Workers of America, District No. 1

(PMW) is a labor organization comprised of a number of constituent local unions of which the petitioner Union is one. PMW has entered into a series of master collective bargaining agreements with the Coal Producers' Association of Illinois (Association), a multi-employer group. The Peabody Coal Co. (Company), while not a member of the Association has adopted these agreements by reference in its contracts.

The two mineworkers who are the objects of the alleged Union's unfair labor practice, and the charging parties, were employees at the Peabody Coal Company's Midwest Mine. The employees of the Midwest Mine are represented by the petitioner Union and at the time of the events in this case, were covered by the then current contract between the Union and the Company, incorporating the current contract between PMW and the Coal Producers' Association.

One of the employee benefit programs established by the contract between the Union and the Company is its Welfare and Retirement Pension Plan. Section 23 of the Special Allocation Plan for the Midwest Mine, governing the details of administration of the Welfare and Retirement Pension Plan, as it applies to Midwest employees, provides that "continuous Union membership" is necessary for eligibility and that "dropping of such membership shall automatically forfeit any funds then allocated or the right to any future allocations."

Melvin Bosse and Marvin Ude had worked at the Midwest Mine for more than 27 and 10 years respectively. Both men were eligible for participation in the Welfare and Retirement Pension Plan upon retirement from the Coal Industry. On January 16, 1967, both Bosse and Ude quit their jobs at Midwest Mine and accepted jobs

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at another mine, at which the employees were represented by the United Mine Workers of America (UMW). By virtue of having accepted such employment, however, Bosse and Ude, both PMW members, violated the membership requirements of the PMW constitution which provides in relevant part:

> Any member of the Progressive Mine Workers of America accepting employment in the coal industry in any mine not under contract with Progressive Mine Workers of America or International Union District 101, [shall] be immediately dropped from membership.
>
> Article VI, Section 5.

On the day they quit the Midwest Mine, January 16, 1967, Bosse and Ude presented to the Union's financial secretary checks for $15.95 for their union dues for the balance of the year. Although the Union originally accepted the two employees' dues, the Union subsequently, after a three-month retention, returned the dues. The Union asserted that Bosse and Ude were no longer eligible to participate in the Welfare and Retirement Pension Plan because of their non-membership in the Union.

The Board found that the Union violated §8(b)(1)(a) of the Act by depriving Bosse and Ude of eligibility for pension and welfare benefits because of non-membership in the Union. The Board further found that the Union's refusal to accept their tendered dues and to permit these employees to remain eligible served as a warning to other Midwest employees that they too might lose such employment benefits in the event they went to work at a UMW mine and lost their membership in the Union. In this respect also, the Board found the Union's conduct violative of §8(b)(1)(a) of the Act.

Accordingly, the Board ordered the Union to cease and desist from the unfair labor practices found and from in

any like or related manner interfering with the Section 7 rights of the employees at the Midwest Mine. Affirmatively, the Board ordered the Union to accept the dues of Bosse and Ude as service fees if they tender them again; to notify the trustees of the Welfare and Retirement Pension Plan that Bosse and Ude have at all times met the Union's requirements for eligibility; and to post appropriate notices.

Section 8(b)(1)(a) of the Act states:

> (b) It shall be an unfair labor practice for a labor organization or its agents
>
> (1) to restrain or coerce
>
> (a) employees in the exercise of rights guaranteed in section 7: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to acquisition or retention of membership therein.

While a union is free to "prescribe its own rules with respect to the acquisition and retention of membership therein," a union violates §8(b)(1)(a) of the Act when it deprives or threatens to deprive employees of employment benefits in order to compel them to fulfill their membership obligations, or as a punishment for their having failed to meet such obligations. *See e.g. N.L.R.B. v. Int'l Hod Carriers,* 295 F. 2d 657, 658 (7th Cir. 1961); *Int'l Union, United Auto Workers, Local 291 v. N.L.R.B.,* 194 F. 2d 698, 702 (7th Cir. 1952).

Here, the Union constitution provides that if a PMW member employee took a job at a mine not under contract to a PMW district or local, the employee would be dropped from PMW membership. Loss of membership, however, is not what resulted in the Board's finding of an unfair labor practice, but loss of membership also

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caused the employees to lose their eligibility for the Welfare and Retirement Pension Plan. The Plan, which provided that employees shall remain members of the Union as a condition of eligibility for benefits, was interpreted by the Union as meaning that employees who were dropped from formal membership in the Union were automatically disqualified from participation in the Plan, even though they were willing to pay a service fee in the form of reduced union dues and thereby bear a portion of the cost of maintaining the Plan.

The Board's order does not require the Union to restore employees Bosse and Ude to union membership or to permit them to participate in Union affairs.[1] Its effect is simply to restore them to eligibility under the terms of the Plan, upon tender of monthly service fees in an amount equal to reduced dues—the same amount of reduced dues Schedule which the Plan makes available for employees who leave the mines to work in other vocations.[2] As the Pension Plan is presently administered, if an employee leaves the coal industry to work in another vocation, or has gone to work at another PMW mine, or has actually retired, he would eventually receive, in monthly installments, retirement benefits then allocated to him on the account books of the Plan. However, if an employee chooses to work in a UMW mine, and thus loses his Union membership, the Union causes him to lose his eligibility to participate in any welfare and pension benefits, including the retirement funds which had been allo-

[1] Consequently, the Union's contention that the Board's order raises serious problems in the face of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 (requiring that all union members be given equal rights to participate in certain intra-union affairs) is unfounded because it is based on the erroneous premise that the Board's order required membership be extended to employees Bosse and Ude.

[2] Union members working in a PMW mine pay dues of 75¢ monthly plus 20% of their gross earnings. A lesser amount is paid by union members who leave the mines to work outside the industry — $1.45 monthly, and $1.00 per month is paid by retired or disabled employees.

cated to him. The Board found, and we agree, that this procedure of denying welfare and pension benefits to employees who change mines and consequently change unions, coerces employees in the exercise of their §7 rights to join or not to join a labor union and is violative of §8(b)(1)(a) of the Act.

The Union asserts, however, that its action was justified because of the existence of a valid union security agreement between the Company and the Union as anticipated by the proviso to §8(b)(1)(a), which states:

> Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention therein.

We disagree with the Union's assertion. The legislative history of this proviso indicates that in enacting §8(b)(1)(a) "Congress was not trying to interfere with the internal affairs of unions, but was trying to outlaw coercive and restraining acts of unions attempting to organize unorganized employees." *Price v. N.L.R.B.*, 373 F. 2d 443, 446 (9th Cir. 1967). (See Legislative History of the Labor Management Relations Act of 1947 at pp. 1139, 1141, 1200; 93 Cong. Rec. 4398, 4400, 4433.) The Labor Board in discussing the scope of the proviso stated:

> Congressional recognition of a labor organization's right to make its own rule presumes, of course, its right to invoke them—except where the implementing of such rules is expressly prohibited, as in the case of affecting an employee's employment rights. *Minneapolis Star & Tribune Co.*, 109 N.L.R.B. 727, 728 (1954).

Consequently, a union security agreement which restrains employees' rights to their job and job benefits and coerces employees in the exercise of their §7 rights to join or refrain from joining a union does not fall within the protection of the proviso to §8(b)(1)(a).

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The result of the PMW's union security agreement as applied to the Union's Welfare and Pension Plan, restrains employees' job benefits and coerces employees in the exercise of their §7 rights and is therefore not a valid justification for the Union's action.

The Union also contends that the Board's findings of a §8(b)(1)(a) violation must fail for want of "actual proof of restraint and coercion." This contention is without merit. This court has held that in determining whether a §8(a)(1) or §8(b)(1) violation has been committed, the answer does not "turn on . . . whether the coercion succeeded or failed . . . the test is whether the employer [Union] engaged in conduct which, it may be reasonably said, tends to interfere with the free exercise of employees' rights under the Act." *N.L.R.B. v. Illnois Tool Works,* 153 F. 2d 811, 814 (7th Cir. 1946, involving a §8(a)(1) violation); *accord Progressive Mine Workers v. N.L.R.B.,* 187 F. 2d 298, 301 (7th Cir. 1951, involving a §8(b)(1) violation). Here, the rejection of the two employees' tendered service fees not only caused loss of welfare and pension eligibility for the two employees, but served notice on other employees that they too would lose their welfare eligibility should they default in their union membership obligation by joining another mine union. We agree with the Board that the Union's practice is inherently destructive of the employees' §7 rights and actual proof of restraint is not necessary, nor, as the Union contends, is it necessary to show that employees Ude and Bosse actually suffered a loss of wages or welfare benefits because of the discriminatory Union plan. *See N.L.R.B. v. Local 815 Teamsters,* 290 F. 2d 99, 102-03 (2d Cir. 1961). Whether the employees actually suffered loss of benefits is immaterial if the Union's acts had discouraged these and other employees from exer-

cising their §7 rights. "The policy of the Act [is] . . . to insulate employees' jobs from their organizational rights." *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 40 (1954).

The Union argues that unless it prevails in this case, employees who leave PMW for work in UMW mines will receive double pension coverage and, consequently, this will result in a migration of employees from one union mine to another causing a substantial depletion of their employees' pension funds. Although this argument may hold some validity, there are no assurances that an employee who transfers from a PMW mine to a UMW mine will satisfy the UMW eligibility requirements. Consequently, under the Union's present administration of its Plan, such employee would be denied retirement benefits under both plans. In addition, if employees who transferred employment did qualify for two pensions, there is nothing in the Board's order which prevents the Union and the Company from renegotiating their Pension Plan to provide for such contingencies.

Finally, the Union argues that the unfair labor practice charge against the Union is barred by the provisions of §10(b) of the Act. Section 10(b) of the Act provides that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board. The Union initially accepted Bosse's and Ude's tender of dues for 1967. Subsequently, their dues were refunded on March 15, 1967, well within the six-month period preceding the filing of the charge. The Union contends, however, that the unfair labor practice in this case occurred when Bosse and Ude began work at the UMW mine in January, 1967, outside the statute-of-limitations period.

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We disagree, the limitation period under §10(b) did not begin to run when Bosse and Ude were notified of their loss of membership in PMW. The Board's finding of a violation occurred and thus the period commenced to run when Bosse and Ude were notified by the Union that their tendered dues would not be accepted and were informed that pursuant to the Union interpretation, they were no longer eligible for the Plan. The Union's assertion that the loss of eligibility was automatic when the employees commenced employment at a UMW mine is untenable in the absence of any Union actions to remove the employees' names from the account books of the Plan or to advise them that they had lost their eligibility.

For the foregoing reasons, the Board's order will be enforced.

ENFORCEMENT ORDERED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.